Supreme Court, U.S.
FILED
SEP 24 2008
OFFICE OF THE CLERK

No. 08-397

IN THE

Supreme Court of the United States

BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, and CARPENTER FINANCIAL GROUP, LLC,

Petitioners,

v.

GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, MASSACHUSETTS LUMBER COMPANY, INC., JOSEPH IANTOSCA, INDIVIDUALLY AND AS TRUSTEE OF THE FAXON HEIGHTS APARTMENTS REALTY TRUST AND FERN REALTY TRUST, and BELRIDGE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

JACK E. ROBINSON
Counsel of Record
BENISTAR
2187 Atlantic Street
Stamford, CT 06902
(203) 969-6000

Counsel for Petitioners

Of Counsel:

ARTHUR R. MILLER
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

218317

QUESTION PRESENTED

For over 60 years, this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), requiring certain "minimum contacts" with the forum State, has been an unwavering limitation on the power of courts to exercise personal jurisdiction over nonresident defendants consistent with the Due Process Clause. An alarming trend has emerged in courts across the country whereby personal jurisdiction is exerted over nonresident defendants solely through the use of the state law concept of jurisdictional veil piercing, *in place of* undertaking the federal constitutional "minimum contacts" analysis required by *International Shoe* and its progeny. The Supreme Judicial Court of Massachusetts has now stretched this practice far beyond its constitutional breaking point. The question presented is:

Whether jurisdictional veil piercing, which depends upon the vagaries and vicissitudes of state law, can be the *sole* basis to exert personal jurisdiction over nonresident defendants consistent with the Due Process Clause?

LIST OF PARTIES AND RULE 29.6 STATEMENT

1. The following are parties to the proceeding in the court below:

Gail A. Cahaly, Jeffrey M. Johnston, Bellemore Associates, LLC, Massachusetts Lumber Company, Inc., Joseph Iantosca, individually and as trustee of the Faxon Heights Apartments Realty Trust and the Fern Realty Trust, and Belridge Corporation, *Plaintiffs-Appellants.*

Benistar Ltd., Benistar Employer Services Trust Corporation, Benistar Admin Services, Inc., Daniel Carpenter, Molly Carpenter, Carpenter Financial Group, LLC, and Benistar Property Exchange Trust Company, Inc., *Defendants-Appellees and Cross-Appellants.*[1]

Merrill Lynch Pierce Fenner & Smith, Inc., *Defendant-Appellee.*[2]

UBS Financial Services Inc. f/k/a PaineWebber Inc., *Defendant-Appellee.*[3]

---

[1] Only Benistar Property Exchange Trust Co., Inc. did not contest personal jurisdiction and, therefore, is not a party to this proceeding.

[2] On September 15, 2008, Bank of America Corporation announced that it had agreed to acquire Merrill Lynch. The transaction is expected to close early in the first quarter of 2009.

[3] PaineWebber, although a defendant-appellee in the Appeals Court of Massachusetts ("Appeals Court"), was not a party to the appeal in the Supreme Judicial Court of Massachusetts ("SJC").

2. Benistar Ltd., Benistar Employer Services Trust Corporation, Benistar Admin Services, Inc., and Carpenter Financial Group, LLC, have no parent corporations, and no publicly held company owns 10% or more of their stock or membership interests.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
INTRODUCTION	3
STATEMENT	4

Contents

	Page
REASONS FOR GRANTING THE PETITION	13
I. The Minimum Contacts Analysis of *International Shoe* is Constitutionally Required for all Determinations of Personal Jurisdiction.	16
II. The Substantial Confusion Among Federal and State Courts Warrants Review By This Court.	25
CONCLUSION	29

TABLE OF APPENDICES

Page

Appendix A — Amended Order And Memorandum Of The Commonwealth Of Massachusetts, Supreme Judicial Court Entered June 26, 2008 ..... 1a

Appendix B — Opinion Of The Supreme Judicial Court Of Massachusetts, Suffolk Dated May 8, 2008 ..... 11a

Appendix C — Opinion Of The Appeals Court Of Massachusetts, Suffolk Dated April 17, 2007 ..... 53a

Appendix D — Award – NASD Dispute Resolution 77a

Appendix E — Judgment Of The Supreme Court Of The State Of New York, County Of New York, Commercial Division Dated And Filed April 18, 2007 ..... 85a

Appendix F — Joint Stipulation Regarding Personal Jurisdiction Dated March 4, 2003 ... 87a

TABLE OF CITED AUTHORITIES

Page

Cases:

"Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 280 N.E.2d 423 (1972) ... 17

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 17, 21

Cahaly v. Benistar Property Exchange Trust Co., Inc., 842 A.2d 1113 (Conn. 2004) 7

Calder v. Jones, 465 U.S. 783 (1984) 13, 20, 21

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) 18, 19, 26

Dakota Indus., Inc. v. Ever Best Ltd., 28 F.3d 910 (8th Cir. 1994) 27

Epps v. Stewart Info. Svcs. Corp., 327 F.3d 642 (8th Cir. 2003) 27

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 19

Hannon v. Beard, 524 F.3d 275 (1st Cir. 2008) ... 17

Hanson v. Denckla, 357 U.S. 235 (1958) 17

Harlow v. Children's Hospital, 432 F.3d 50 (1st Cir. 2005) 18

Cited Authorities

Page

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 17

Intech, Inc. v. Triple "C" Marine Salvage, Inc., 826 N.E.2d 194 (Mass. 2005) 24

International Shoe Co. v. Washington, 326 U.S. 310 (1945) ..... *passim*

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 13, 21

Miller v. Miller, 861 N.E.2d 393 (Mass. 2007) .. 24

Milliken v. Meyer, 311 U.S. 457 (1940) 17

PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163 (Tex. 2007) 28

Phillips v. Prairie Eye Center, 530 F.3d 22 (1st Cir. 2008) 18

Rush v. Savchuck, 444 U.S. 320 (1980) 13, 21

Shaffer v. Heitner, 433 U.S. 186 (1977) 16

United States v. Scophony Corp., 333 U.S. 795 (1948) 20

Cited Authorities

	Page
Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977)	28
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	13, 17
Statutes:	
MASS. GEN. LAWS ANN. ch. 223A, § 3 (2000)	3
NEV. REV. STAT. ANN. § 645G.300(2) (2008)	6
28 U.S.C. § 1257(a)	1
Rules:	
Mass. R. Civ. P. 12(b)(2)	9
U.S. Sup. Ct. R. 14.1(g)(i)	13
United States Constitution:	
Fourteenth Amendment	2

Page

Other Authorities:

26 C.F.R. § 1.1031(k)-1 7

26 C.F.R. § 1.1031(k)-1(g)(4) 5

26 C.F.R. § 1.1031(k)-1(k)(2) 9

I.R.C. § 1031 5

I.R.C. § 1031(a) 4, 7

I.R.C. § 1031(a)(3) 5

Phillip I. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations (1983) ... 25

Daniel G. Brown, Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595 (1992) 15, 16

Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) 14

Lonnie S. Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004) 13, 19

Cited Authorities

Page

Joseph Iantosca, et al. v. Merrill Lynch Pierce Fenner & Smith, Inc., Civil Action No. 08-0775-D, Suffolk Superior Court (filed Feb. 15, 2008) 7

Press Release, *Commission Denies Petition for Rulemaking Related to "Qualified Intermediaries" Under Internal Revenue Code Section 1031*, FTC (Aug. 26, 2008), available at http://www.ftc.gov/opa/2008/08/qis.shtm (last visited Sep. 23, 2008) 6

Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports With Due Process*, 96 CAL. L. REV. 731 (2008) 15-16, 25, 26

John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445 (2004) 20

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP'T OF TREASURY, PUBL'N NO. 2007-30-172, *Like-kind Exchanges Require Oversight to Ensure Taxpayer Compliance* 7 n. 14 (Sep. 17, 2007) ("2007 Treasury Report") 5

Cited Authorities

Page

William A. Voxman, *Jurisdiction Over a Parent Corporation in it's Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327 (1992) 16

4A Wright & Miller, *Federal Practice and Procedure* § 1069.4 (3d ed. 2002) 22

PETITION FOR A WRIT OF CERTIORARI

Petitioners Benistar Ltd., Benistar Employer Services Trust Corporation, Benistar Admin Services, Inc., Daniel Carpenter, Molly Carpenter, and Carpenter Financial Group, LLC (collectively, "Benistar" or the "Benistar defendants"), respectfully petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts ("SJC").

OPINIONS BELOW

The opinion of the SJC (App. 11a-52a) is reported at 885 N.E.2d 800. The amended order and memorandum of the SJC, dealing solely with Benistar's personal jurisdiction arguments (App. 1a-10a), is unreported. The opinion of the Appeals Court (App. 53a-76a) is reported at 864 N.E.2d 548. The relevant trial court orders are unreported.

JURISDICTION

The opinion of the SJC was issued on May 8, 2008. App. 11a. The SJC issued an amended order and memorandum, dealing solely with Benistar's personal jurisdiction arguments, denying Benistar's timely petition for rehearing on June 26, 2008. App. 10a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." U.S CONST., amend. XIV, § 1.

The Massachusetts long-arm statute provides, in relevant part:

> **§ 3. Personal Jurisdiction Based Upon Acts or Conduct Within Commonwealth.**
>
> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
>
> (a) transacting any business in this commonwealth;
>
> (b) contracting to supply services or things in this commonwealth;
>
> (c) causing tortious injury by an act or omission in this commonwealth;
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other

> persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth * * *.

MASS. GEN. LAWS ANN. ch. 223A, § 3 (2000).

INTRODUCTION

This case raises important issues of constitutional law that are litigated with great frequency in federal and state courts across the country. It also presents a valuable and ripe opportunity for this Court to provide much-needed clarity concerning the limits imposed by the Due Process Clause on the power of a court to exercise personal jurisdiction over nonresident defendants.

The Supreme Judicial Court of Massachusetts ("SJC") held that Massachusetts may hale Delaware and Connecticut citizens into court to defend a contract and tort action, even though they had no contacts in their own right with Massachusetts. Plaintiffs even stipulated in writing that none of the elements of the Massachusetts long-arm statute were satisfied as to certain of the defendants. The SJC was able to reach this flawed result only by relying on the Massachusetts contacts of Benistar Property Exchange Trust Co., Inc. ("BPE"), a corporate affiliate of petitioners, applying Massachusetts law to pierce the corporate veil of BPE, and then attributing BPE's Massachusetts contacts to petitioners. At no time, however, did the SJC conduct the federal constitutional "minimum contacts" analysis required by *International Shoe* and its progeny.

The SJC's far-reaching and misguided decision presents an important issue concerning the administration of justice across the country: whether there exists an exception to this Court's "minimum contacts" requirement for personal jurisdiction under the Due Process Clause, in cases where the corporate veil can be pierced as a matter of state law? This Court has never addressed the issue, but "jurisdictional veil piercing" is used with increasing frequency in the federal and state courts to circumvent this Court's repeated holdings that personal jurisdiction over a nonresident defendant requires proof of *that defendant's* "minimum contacts" with the forum State. Whether and when such jurisdictional veil piercing is appropriate presents fundamental questions of civil procedure and due process, over which the federal and state courts are hopelessly confused, and about which commentators have been calling for this Court's guidance for decades. It is time for this Court to decide the matter once and for all.

STATEMENT

1. *Factual Background.* The relevant facts are undisputed. From 1998 until the end of 2000, BPE acted as a "qualified intermediary" for like-kind property exchanges under I.R.C. § 1031(a) (App. 54a), and successfully completed over $100 million of exchanges. SJC App. 1495-98; 6912; 6979-7036; 7101-7526; 7533-91; 7602-79; 7823-7973; 8347-96; 8440-42; 10291-10605 (Merrill Lynch and PaineWebber account statements). Under normal circumstances, when a taxpayer sells an investment property, tax must be paid on the gain. An I.R.C. § 1031 Tax Deferred Exchange allows an

exception to payment of the capital gains tax. When a taxpayer (called an "exchangor") sells investment real estate and replaces it with different investment real estate using an exchange, the payment of capital gains tax normally required on such a sale can be deferred. As long as a property used for investment is replaced with similar property within 180 days, no gain is recognized at that time; rather, the gain is deferred until the eventual sale of the replacement property. I.R.C. § 1031(a)(3). However, upon the sale of the relinquished property, "[i]f taxpayers take possession of the cash, they are disallowed the tax advantages of the like-kind exchange provisions." TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP'T OF TREASURY, PUBL'N NO. 2007-30-172, *Like-kind Exchanges Require Oversight to Ensure Taxpayer Compliance* 7 n. 14 (Sep. 17, 2007) ("2007 Treasury Report"). In order to avoid taking possession of the cash from the sale of the relinquished property, exchangors normally rely on the "safe harbor" provided by 26 C.F.R. § 1.1031(k)-1(g)(4), in which the exchangor utilizes the services of a "qualified intermediary" (such as BPE) to invest the cash until the purchase of the replacement property. "[I]f taxpayers do not specifically follow the rules for like-kind exchanges, they could be held liable for taxes, penalties, and interest on their transactions." 2007 Treasury Report at 1.

2. In its written agreements with the exchangors, BPE promised to invest the cash during the 180-day holding period with Merrill Lynch and later PaineWebber, and to return the principal plus either 3% or 6% interest based on the exchangor's selection. App. 55a. BPE's agreements with the exchangors did

not limit the kinds of investments that BPE could make in order to generate the necessary 3% or 6% return. SJC App. 6508; 6284 (BPE agreements). Nor is there any statute or regulation that governs how § 1031 proceeds can be invested.[4]

3. Petitioner Daniel Carpenter (BPE's chairman) caused BPE to invest all client funds in stock options and other securities offered through Merrill Lynch and later PaineWebber. App. 55a. During the historic stock market collapse of December 2000, PaineWebber mishandled BPE's investment accounts and caused BPE to sustain losses of approximately $9 million of the funds of seven clients, as well as over $2.4 million of Carpenter's own funds that he had invested in BPE. App. 55a; 79a. In January 2001, the seven clients whose funds were lost (respondents herein) sued BPE, BPE president Martin L. Paley, Merrill Lynch, PaineWebber, and the Benistar defendants in Massachusetts state court on contract and tort claims. One of the clients also sought to obtain prejudgment remedies against Benistar in Connecticut, where Benistar is located. However, Benistar prevailed in the Connecticut

---

[4] In August 2008, the Federal Trade Commission ("FTC") denied a petition to adopt regulations that would have imposed restrictions on how § 1031 funds can be invested. *See* Press Release, *Commission Denies Petition for Rulemaking Related to "Qualified Intermediaries" Under Internal Revenue Code Section 1031*, FTC (Aug. 26, 2008), available at *http://www.ftc.gov/opa/2008/08/qis.shtm* (last visited Sep. 23, 2008). The § 1031 industry remains unregulated at the federal level, and only one State—Nevada—has (just recently) enacted laws on the state level. *See* NEV. REV. STAT. ANN. § 645G.300(2) (2008).

Supreme Court with a unanimous decision in its favor. *Cahaly* v. *Benistar Property Exchange Trust Co., Inc.*, 842 A.2d 1113 (Conn. 2004).

4. In the Massachusetts action, the plaintiffs blamed BPE's investment strategy for the losses, notwithstanding that investing in stock options is not prohibited by I.R.C. § 1031(a), 26 C.F.R. § 1.1031(k)-1, case law, regulation, or—most importantly—BPE's written contracts with the plaintiffs. BPE, however, attributed the losses to PaineWebber's mishandling of BPE's investment accounts. As a result, BPE filed an arbitration claim against PaineWebber. In December 2005, the arbitrators unanimously awarded BPE $12.6 million against PaineWebber. App. 77a-84a. In April 2007, the arbitration award was upheld on appeal and final judgment was entered against PaineWebber. App. 85a-86a. In May 2008, after PaineWebber abandoned further appeals of the award, BPE voluntarily assigned the entire $12.5 million settled judgment to the plaintiffs, thereby making them whole (and then some) on their $9 million in losses.[5]

5. BPE president Martin Paley resided in Massachusetts and BPE is a Delaware corporation that maintained its offices in Paley's home. SJC App. 1622. From those offices, Paley solicited and obtained clients

---

[5] In February 2008, the plaintiffs filed a new action in Massachusetts state court solely against Merrill Lynch arising out of the same events. In their new complaint, the plaintiffs make no allegations of wrongdoing against Benistar. *See Joseph Iantosca, et al. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, Civil Action No. 08-0775-D, Suffolk Superior Court (filed Feb. 15, 2008).

for BPE. SJC App. 1623. Paley handled all of BPE's marketing, had the exclusive interactions and communications with the clients, solicited the clients, and executed all of the transaction documents with the clients. *Id.* It is undisputed that both Paley and BPE have sufficient minimum contacts with Massachusetts to permit suit against them. By contrast, petitioners Daniel and Molly Carpenter (Daniel's spouse and an officer of BPE) resided and worked in Connecticut. SJC App. 8559; 8866. Daniel had no contact with the clients and simply invested the clients' funds after they had been forwarded to BPE's accounts, first at Merrill Lynch (in New York) and later at PaineWebber (also in New York). SJC App. 1625. Molly Carpenter was an officer of BPE in name only—merely to allow BPE to establish its Merrill Lynch and PaineWebber investment accounts (which required the signatures of at least two officers), lived and worked in Connecticut, and had no contact with the clients or Massachusetts. SJC App. 3762; 3931; 4026; 4092-93 (plaintiffs' testimony that they never met with, spoke to, or communicated with Molly). All of the remaining Benistar defendants are entities that are organized under the laws of the State of Delaware and maintain their principal places of business in Connecticut. SJC App. 1630; 1632; 3140-41; 3148. None of the petitioners were domiciled in Massachusetts, maintained offices in Massachusetts, transacted any business in Massachusetts, had any contacts with Massachusetts, or otherwise engaged in any acts enumerated in the Massachusetts long-arm statute. App. 87a-90a; SJC App. 5819.

6. *Procedural Background.* On March 29, 2001, Benistar Ltd., Daniel Carpenter and Molly Carpenter filed in the trial court a motion to dismiss for lack of personal jurisdiction pursuant to Mass. R. Civ. P. 12(b)(2).[6] Dkt. 29. By order dated April 30, 2001, the trial court deferred decision on the motion pending jurisdictional discovery. Dkt. 33. In a memorandum and order dated November 21, 2001, the trial court denied these Benistar defendants' motion to dismiss. Dkt. 105.

On February 7, 2002, the remaining petitioners filed in the trial court a motion to dismiss for lack of personal jurisdiction pursuant to Mass. R. Civ. P. 12(b)(2). Dkt. 149. By memorandum and order dated March 12, 2002, the trial court denied the motion. On August 29, September 3, and September 10, 2002, all petitioners filed in the trial court motions for reconsideration of the denial of their motions to dismiss for lack of personal jurisdiction, and all such motions for reconsideration were denied. Dkts. 219-21, 224.

The trial began in November 2002 and was divided into three phases. During the first phase (jury), the trial court directed a verdict in favor of Molly Carpenter on all but one cause of action. The sole remaining claim against her, breach of fiduciary duty, was allowed to go to the jury, notwithstanding that no fiduciary relationship existed as a matter of federal law. *See* 26 C.F.R. § 1.1031(k)-1(k)(2) (disqualifying fiduciaries from acting as qualified intermediaries). In December

---

[6] "[T]he following defenses may at the option of the pleader be made by motion: (2) Lack of jurisdiction over the person." Mass. R. Civ. P. 12(b)(2).

2002, the jury returned a verdict against BPE, Daniel Carpenter, Molly Carpenter, Paley, and Merrill Lynch on all remaining claims in the amount of $8.6 million. App. 13a.[7]

In March 2003, the plaintiffs stipulated in writing that they had no dealings with most of the Benistar defendants, and that none of the elements of the Massachusetts long-arm statute were satisfied as to these defendants. App. 87a-90a. Notwithstanding this stipulation, the trial court refused to dismiss all claims against these Benistar defendants for lack of personal jurisdiction.

In September 2003, at the conclusion of the second (non-jury) phase of the trial, the trial court awarded plaintiffs double damages and attorneys' fees against BPE, Daniel Carpenter, and Paley, but significantly found that Molly Carpenter was not liable for double damages because there was "no evidence that [Molly's]

---

[7] Within an hour after the verdict, in a story reported in the *Massachusetts Lawyers Weekly*, two jurors telephoned plaintiffs' counsel, informed counsel that the entire jury was having "some beers" at a bar in downtown Boston, and invited *all* of the plaintiffs' attorneys to join them. App. 67a. Despite this shocking development, the trial court denied Benistar's motion to conduct an evidentiary hearing into possible jury misconduct, and also denied Benistar's motion for a new trial. *Id.* The Appeals Court found that the jurors' actions were merely "inappropriate," *id.*, and held that "[t]here was no error or abuse of discretion," *id.*, in the trial court's failure to investigate this outrageous and obviously prejudicial conduct. The trial court did, however, grant Merrill Lynch's motion for judgment notwithstanding the verdict on different grounds.

conduct occurred primarily or substantially in Massachusetts, . . . and no evidence connected Molly with the plaintiffs or with Massachusetts in any but the most desultory way." Trial Ct. Order at 9 (Sep. 24, 2003). Yet, in light of this finding, the trial court refused to grant Molly Carpenter's renewed motion to dismiss for lack of personal jurisdiction. Dkt. 323. The trial court then found in the third phase of the trial (also non-jury) that the corporate veil of BPE should be pierced in order to hold the remaining Benistar defendants substantively liable on the jury's verdict.

7. On appeal to the Appeals Court, all petitioners challenged the trial court's exercise of personal jurisdiction over them. Benistar App. Ct. Br. 18-30; Benistar App. Ct. Reply Br. 4-11. In its opinion, the Appeals Court rejected Benistar's arguments regarding personal jurisdiction, holding that "[t]he plaintiffs' theory of personal jurisdiction was necessarily intertwined with the merits of their claim that corporate disregard was appropriate in this case." App. 66a.

On further appeal to the SJC, all petitioners once again challenged the trial court's exercise of personal jurisdiction over them. Benistar SJC Br. 20-36; Benistar SJC Reply Br. 16-19. In its initial 22-page opinion, which focused almost exclusively on Merrill Lynch's claims, the SJC did not analyze Benistar's jurisdictional arguments at all, and rather dismissively devoted only one paragraph to the remainder of Benistar's claims. App. 51a-52a. As a result, Benistar filed a timely petition for rehearing in the SJC, which was denied on June 26,

2008, in an amended order and memorandum that dealt solely with Benistar's personal jurisdiction arguments. App. 1a-10a. The SJC held:

> The fundamental argument of the Benistar defendants in their petition is that the determination of personal jurisdiction should be made before and not in light of the trial judge's findings on piercing the corporate veil. This is not the law under either the Massachusetts long-arm statute or the Due Process [C]lause.

App. 7a.

The SJC did not hold that the Benistar defendants have "minimum contacts" with Massachusetts sufficient to render the assertion of jurisdiction over them fair, just, and reasonable. Instead, the SJC simply determined that because personal jurisdiction existed over BPE, and the corporate veil between BPE and the Benistar defendants could be pierced as a matter of Massachusetts state law, that BPE's forum contacts with Massachusetts could simply be attributed to the Benistar defendants.

8. *Preservation of Federal Questions.* Benistar has consistently raised the federal questions sought to be reviewed in this matter numerous times in the trial court (Dkt. 29; 149; 219-21), the Appeals Court (Benistar App. Ct. Br. 18-30; Benistar App. Ct. Reply Br. 4-11), and the SJC (Benistar SJC Br. 20-36; Benistar SJC Reply Br. 16-19). As a result, the federal questions raised herein

were timely and properly raised below, and this Court has jurisdiction to review the judgment of the SJC on a writ of certiorari. Rule 14.1(g)(i).

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that personal jurisdiction cannot be asserted unless the nonresident defendant has minimum contacts with the forum State "such that he should reasonably anticipate being haled into court there," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and that "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984). *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."). Notwithstanding this Court's clear and repeated holdings, however, federal and state courts frequently permit the assertion of personal jurisdiction in circumstances where such contacts are not present, on the basis of the metaphysical concept of "jurisdictional veil piercing" that this Court has never endorsed.

"[T]he use of veil piercing for jurisdictional purposes is unwarranted as a matter of precedent and unwise as a matter of policy." Lonnie S. Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1032 (2004). When this Court's precedents are properly understood, the doctrine of jurisdictional veil piercing

is both unnecessary and pernicious in its application. In cases where it produces appropriate results, jurisdiction might have been founded directly on the defendant's own contacts with the forum State. When, for example, officers, employees, or shareholders of a corporate enterprise deliberately conspire to cause harm in another State, personal jurisdiction will generally be appropriate on the basis of their individual activities directed at that State. If, however, a rogue employee commits harm in some distant State, that State cannot exert personal jurisdiction over a shareholder in the company unless he "purposefully availed" himself of the privilege of doing business there. Jurisdiction over that shareholder is plainly inappropriate under this Court's precedents. And the fact that the corporate veil might be pierced for unrelated state law reasons does not increase or decrease his relevant forum contacts one iota. Jurisdictional veil piercing improperly makes personal jurisdiction turn on state law merits doctrines that are irrelevant to the purposes animating the Due Process law of personal jurisdiction—and are notoriously vague and arbitrary to boot. As Judge Easterbrook has noted: "'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

In this case, the plaintiffs never attempted to show that the Benistar defendants have any genuine personal connection to Massachusetts. Indeed, the plaintiffs affirmed in writing that they had no evidence of such contacts and no intention of introducing any. App. 87a-90a. Petitioners' motions to dismiss for lack of personal

jurisdiction should have been granted by the Massachusetts trial court, and the decisions of the Appeals Court and the SJC to affirm the denial of those motions should be reversed and vacated by this Court. Instead, the Massachusetts courts exerted authority over the Benistar defendants on the basis of the Massachusetts contacts of BPE, without any genuine inquiry into whether (by joint action with BPE or otherwise) they purposefully directed their actions at Massachusetts in a manner sufficient to support jurisdiction there.[8]

Federal and state courts, as well as legal commentators, are hopelessly confused about whether, and when, the forum contacts of one defendant can be attributed to another on the basis of veil piercing. "When the haze of state jurisdictional law collides with the metaphor-filled fog of the 'piercing the corporate veil' doctrine, the result is, predictably, a smog of the thickest variety." Daniel G. Brown, Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 595 (1992). This Court should seize this opportunity to clear the jurisprudential smog in this area because "[n]either state nor federal courts have made clear the situations in which they will exercise jurisdiction over an out-of-state corporation based on the presence of an affiliated corporation within the forum." *Id.*; *see also, e.g.*, Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien*

---

[8] In fact, one of the plaintiffs (Bellemore Associates, LLC) is located in New Hampshire (SJC App. 6314), so it did not even feel the effects of the investment losses in Massachusetts.

Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports With Due Process, 96 CAL. L. REV. 731, 744 (2008) ("Unfortunately, the Supreme Court has not yet considered the problem of veil-piercing for jurisdictional purposes in light of its ruling in *Asahi* [*Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987)]."); William A. Voxman, *Jurisdiction Over a Parent Corporation in it's Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327, 370 (1992) ("Part of the confusion surrounding the question of when the exercise of jurisdiction over a parent corporation based on its ownership of a subsidiary is constitutionally valid is due to the lack of specific United States Supreme Court guidance in this area."). National uniformity and clarity are sorely needed in this area of the law. "In light of the confusion among the courts concerning the authority of states to exercise jurisdiction over corporations on the basis of the activities of affiliated corporations, the United States Supreme Court should resolve the issue." Brown, 61 U. CIN. L. REV. at 618.

I. The Minimum Contacts Analysis of *International Shoe* is Constitutionally Required for all Determinations of Personal Jurisdiction.

This Court has never held that jurisdiction can be predicated on piercing the corporate veil. Instead, it has articulated a simple, universal, two-part test for determining personal jurisdiction. First, the exercise of jurisdiction over nonresident defendants must be authorized by the forum State's long-arm statute. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). Second, the defendant must have "certain minimum contacts with [the forum State] such that the maintenance of the suit

does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Minimum contacts generally require "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)), "'such that he should reasonably anticipate being haled into court there.'" *Id.* at 474 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297). When a forum State's long-arm statute is co-extensive with the outer limits of due process, a court may sidestep the statutory inquiry and proceed directly to the constitutional analysis. *Hannon v. Beard*, 524 F.3d 275, 280 (1st Cir. 2008). The SJC has interpreted the Massachusetts long-arm statute, enacted in 1968, "as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." *"Automatic" Sprinkler Corp. of America v. Seneca Foods Corp.*, 280 N.E.2d 423, 424 (1972).

This Court has recognized different thresholds for minimum contacts, depending on whether the jurisdiction asserted is "specific" or "general" in nature. Specific jurisdiction permits the adjudication of only those claims that relate to or arise out of a defendant's contacts with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the

State is exercising 'specific jurisdiction' over the defendant."). In contrast, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.* at 415 n.9. "For specific jurisdiction, the constitutional analysis is divided into three categories: relatedness, purposeful availment, and reasonableness." *Phillips v. Prairie Eye Center*, 530 F.3d 22, 27 (1st Cir. 2008). On the other hand, "[t]he standard for evaluating whether . . . contacts satisfy the constitutional general jurisdiction test is considerably more stringent than that applied to specific jurisdiction questions." *Harlow v. Children's Hospital*, 432 F.3d 50, 64 (1st Cir. 2005).

Despite the routine and pervasive importance of the issue in civil litigation, this Court has said remarkably little about how the "minimum contacts" analysis should proceed in cases involving corporations. The seminal case is *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), in which a Maine corporation was sued in North Carolina on the basis of activities conducted by a wholly-owned subsidiary that "[t]hrough ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way . . . as it does over those selling branches or departments of its business not separately incorporated . . ." *Id.* at 335. However, "[t]he existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by

appropriate entries in their respective books in the same way as if the two were wholly independent corporations." *Id.* This Court held that because [t]he corporate separation, though perhaps merely formal, was real" and "was not pure fiction," the North Carolina contacts of the subsidiary could not be attributed to the parent corporation. *Id.*

Cannon strongly suggests that the corporate form cannot be disregarded for purposes of asserting jurisdiction, even under circumstances of complete domination that might justify veil piercing under the law of many States, so long as the separate corporate existence is "not pure fiction." *Cannon* fits uneasily at best, however, into this Court's modern jurisprudence of personal jurisdiction. *Cannon* expressly disavows any constitutional holding. It was decided under the now-discredited "presence" theory of personal jurisdiction. *Id.* at 334-35. It was decided before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *International Shoe*. And one commentator argues persuasively that it was decided purely under the North Carolina long-arm statute and, therefore, actually suggests nothing about whether the *constitutional* limits on personal jurisdiction could ever be satisfied through a veil piercing theory. *See* Hoffman, *supra*, at 1067-74. Justice Brandeis's opinion for the Court in *Cannon* expressly disavows any constitutional holding. 267 U.S. at 336 ("No question of constitutional powers of the State, or of the federal Government, is directly presented."). Nonetheless, *Cannon* is still frequently cited as the leading case on personal jurisdiction in cases involving the corporate form, and the separate contacts of parent and subsidiary corporations, as well as shareholders.

See generally John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445, 455-56 (2004); *compare United States v. Scophony Corp.*, 333 U.S. 795 (1948).

The only truly useful modern guidance this Court has provided on these issues comes from a pair of cases decided in 1984. In *Calder v. Jones*, 465 U.S. 783 (1984), this Court considered a libel claim brought by a California resident against the National Enquirer and the author and editor of an article about him. All the defendants were residents of Florida. Although personal jurisdiction over the Enquirer itself in California was clear, the editor and author "liken[ed] themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California," and urged that they were not responsible for their employer's California contacts for jurisdictional purposes. 465 U.S. at 789. This Court rejected that argument, focusing squarely on the petitioners' own conduct. This Court emphasized that their actions were "expressly aimed at California," and that they knew their article would have a "potentially devastating impact on respondent" and that "the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation." *Id.* at 789-90. This Court explained that "[p]etitioners are correct that their contacts with California are not to be judged according to their employers' activities there," but "[o]n the other hand, their status as employees does not somehow insulate them from jurisdiction." *Id.* at 790. Rather, "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.*

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court briefly applied the reasoning of *Calder* to hold that personal jurisdiction over Hustler Magazine did not necessarily establish personal jurisdiction over its publisher, editor, and owner, Larry Flynt. This Court explained again that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary." 465 U.S. at 781 n. 13. Instead, "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* This Court cited *Rush v. Savchuck*, 444 U.S. 320, 332 (1980), for the proposition that "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Id.*

In 1985, this Court was presented with a question about whether the forum contacts of one business partner could be attributed to another. The issue was whether personal jurisdiction might be asserted over one co-owner of a restaurant franchise because of his business partner's trip to Florida. This Court stated that "[w]e have previously noted that when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party . . . at least where he is a 'primary participan[t]" in the enterprise and has acted purposefully in directing those activities." *Burger King*, 471 U.S. at 479 n.22 (citing *International Shoe*, 326 U.S. at 320, and *Calder*, 465 U.S. at 790). This Court ultimately held that personal jurisdiction was proper on other grounds, and that it therefore "need not resolve the permissible bounds of

such attribution." *Id.* at 22. This Court's dictum essentially reinforces its earlier holding in *Calder*, however, by stressing that personal jurisdiction over the business partner would require proof that he personally "acted purposefully in directing [the] activities" in the forum State.

This Court's personal jurisdiction precedents endorse the simple principle that each defendant's contacts with the forum State must be analyzed individually. As a matter of Due Process, a defendant who has personally directed his own actions at the forum cannot escape personal jurisdiction just because those actions were performed on behalf of an employer or corporation.[9] On the other hand, a corporation's own contacts with a State do not subject every employee or shareholder or affiliated corporation to jurisdiction there, if the particular defendant played no sufficient personal role in those contacts. Those principles provide a coherent and comprehensive resolution to the due process issues posed by personal jurisdiction in the corporate context, without the need for any confusing and theoretically indefensible incorporation of state-law veil piercing principles. As Professor Hoffman cogently explains:

> If a defendant has been involved in committing some act of mischief in the forum, modern doctrine already permits the exercise

---

[9] The state law "fiduciary shield" doctrine may nonetheless bar personal jurisdiction in circumstances where the defendant's contacts were entirely in a representative capacity. *See, e.g.*, 4A Wright & Miller, *Federal Practice and Procedure* § 1069.4, at 191-96 (3d ed. 2002).

> of jurisdiction in the forum court over her, regardless of whether she is present in the state or not or whether she personally committed the mischief or played a role in directing such mischief from behind the scenes. . . . [T]he only relevance of a close relationship between otherwise separate persons or entities in a specific jurisdiction case should be part of the analysis of whether the defendant's degree of involvement with the underlying controversy is sufficient to bring it within the statutory and constitutional ambit of judicial authority.

152 U. Pa. L. Rev. at 1097-98.

The state law of veil piercing, by contrast, "is fundamentally ill-conceived as a doctrinal tool for measuring state court power." *Id.* at 1102. "What does a failure to follow corporate formalities, for instance, tell us about the regulatory interests a state may have in allowing suit to be maintained against a nonresident defendant?" *Id.* at 1085-86. "What possible significance can there be in a finding that regular shareholder meetings were not conducted to the jurisdictional assessment of the defendant's relationship to, and interest in, avoiding suit in the forum or of the plaintiff's interest in maintaining suit there?" *Id.* at 1086.

The veil piercing analysis conducted by the SJC in this case is entirely inconsistent with assessing the contacts of each Benistar defendant individually, as required by this Court's precedents. It substitutes vague and notoriously arbitrary state law doctrines for

a close analysis of individual "minimum contacts" under federal law. This Court should grant review to clarify that *International Shoe* and its progeny state the test for personal jurisdiction in *all* cases, and not merely those that do not involve corporate relationships.

There has been no showing here that personal jurisdiction over Benistar exists in Massachusetts under the minimum contacts test of *International Shoe*. The plaintiffs and the SJC instead relied solely on state law jurisdictional veil piercing. Indeed, plaintiffs have essentially conceded that they were unable to satisfy *International Shoe* as to several of the Benistar defendants because they stipulated in writing that the relevant elements of the Massachusetts long-arm statute were not satisfied. App. 87a-90a. It is axiomatic that "[t]he burden is on the party asserting jurisdiction to prove jurisdictional facts." *Miller v. Miller*, 861 N.E.2d 393, 398 (Mass. 2007). *See also Intech, Inc. v. Triple "C" Marine Salvage, Inc.*, 826 N.E.2d 194, 197 (Mass. 2005) ("A plaintiff has the burden of establishing facts to show that the ground relied on under § 3 [of the long-arm statute] is present."). Thus, plaintiffs have necessarily stipulated in writing that they could not satisfy their burden of proving the requisite jurisdictional facts as to these defendants.

II. The Substantial Confusion Among Federal and State Courts Warrants Review By This Court.

Despite the fact that this Court has consistently framed the due process inquiry as a question of each defendant's individual "minimum contacts" with the forum, and has never held that personal jurisdiction could be based merely on veil piercing notions, the use of veil piercing for jurisdictional purposes in the lower courts is extremely common. As Professor Hoffman explains, "Dean Phillip Blumberg's masterful multivolume treatise, The Law of Corporate Groups, devotes an entire volume in excess of 450 pages (and a supplement of nearly equal length) to cataloging judicial decisions in which the substantive law is invoked as the sought-after predicate for a vicarious jurisdictional determination." 152 U. Pa. L. Rev. at 1029 (citing Phillip I. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations (1983)). "Virtually without dissent during the better part of this century, the lower courts have approved jurisdictional veil-piercing arguments to satisfy the statutory and constitutional requirements for amenability to suit." *Id.* at 1030.

Several distinct approaches have emerged, but "[o]utcomes in [jurisdictional] veil piercing cases are fraught with inconsistency and clear trends are difficult to deduce even within individual jurisdictions." Schwartz, 96 CAL. L. REV. at 752. Schwartz categorizes the cases into three general approaches: the corporate formalities approach, the control approach, and a hybrid approach combining the other two approaches. *Id.* at 746-751. Courts taking the corporate formalities

approach seem to have adopted this Court's invitation in *Cannon* that courts should respect the corporate form for jurisdictional purposes so long as it is not a complete "fiction." *See id.* at 747 (*Cannon* "continues to be cited frequently to support decisions where courts refrain from piercing the corporate veil to assert jurisdiction over a foreign parent."). "Indeed, because the Court maintained the separate identity of the two notwithstanding the complete dominion and control of the parent over the subsidiary, some courts have viewed *Cannon* as imposing an even higher standard than traditional veil piercing doctrine." Swain & Aguilar, 84 B.U. L. REV. at 455-56.[10] The control and hybrid approaches borrow more heavily from ordinary state veil piercing doctrines. And, of course, many courts (like the SJC here) simply rely on state veil piercing law directly. Whichever approach a court adopts, "the court's inquiry will be fact dependent, discretionary, and difficult to predict." Schwartz, 96 CAL. L. REV. at 751. Whether a State has violated the Due Process Clause by exerting personal jurisdiction over nonresident defendants cannot rest on such hazy, uncertain, and fact-specific analyses.

Occasionally, a court will recognize that the federal due process analysis and the state law veil piercing test are not the same, and will attempt to draw distinctions.

---

[10] Swain and Aguilar's empirical analysis led them to conclude that "the *Cannon* doctrine is as strong a precedent today as it was the day after it was decided," *id.* at 483, and that "courts show a bias against foreign defendants, [and] that state courts favor local plaintiffs." *Id.* Given Benistar's harrowing experience in the Massachusetts state courts, these conclusions are not surprising.

The results remain inconsistent, however, both within and across jurisdictions. For example, in *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910 (8th Cir. 1994), the Eighth Circuit stated:

> A determination to pierce the corporate veil does not necessarily answer the question of a court's jurisdiction over the individuals behind the veil . . . Whether an individual is subject to the jurisdiction of a federal court is a separate threshold issue, which the district court conflated with the issue of the individuals' liability for corporate actions. *The district court should have undertaken a minimum contacts/due process analysis instead of merely piercing the corporate veil.*

Id. at 915 (emphasis added). However, in *Epps v. Stewart Info. Svcs. Corp.*, 327 F.3d 642 (8th Cir. 2003), a different Eighth Circuit panel simply asserted that:

> If the resident subsidiary corporation is the alter ego of the nonresident corporate defendant, the subsidiary's contacts are those of the parent corporation's, and due process is satisfied. . . . Personal jurisdiction can be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation. . . . In view of these principles, a court's assertion of jurisdiction is contingent on the ability of the plaintiffs to pierce the corporate veil.

Id. at 649 (citations omitted).

A few decisions have held that veil-piercing is a legitimate basis for jurisdiction, but nonetheless have recognized that certain aspects of state veil-piercing law are not relevant to the jurisdictional inquiry. In *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir. 1977), for example, the court noted that undercapitalization,

> which is important to deciding whether to pierce the veil raised by a subsidiary corporation in order to hold the parent corporation liable for failure of the subsidiary to meet its debts, may not be relevant to a showing that the two corporations are in fact one so as to establish that the out-of-state corporation—be it parent or subsidiary—is present within the forum for jurisdictional purposes.

The Texas Supreme Court has explained that "veil-piercing for purposes of liability ('substantive veil-piercing') is distinct from imputing one entity's contacts to another for jurisdictional purposes ('jurisdictional veil-piercing')," and that "[c]ourts have acknowledged that jurisdictional veil-piercing and substantive veil-piercing involve different elements of proof." *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 174-75 (Tex. 2007) (collecting authorities). The Texas Supreme Court ultimately concluded that "fraud—which is vital to piercing the corporate veil under section 21.223 of the Business Organizations Code—has no place in assessing contacts to determine jurisdiction," and that "some of the factors courts look to in determining whether an entity may be held liable as a 'single business

enterprise,'" such as the use of a common name, "are irrelevant to an analysis of jurisdictional contacts." *Id.* at 175. "Whether two related entities share a common name, however, does not affect whether each has sufficient contacts with the forum for jurisdictional purposes." *Id.*

As the commentators discussed *supra* explain, the case law in both state and federal courts is deeply confused and inconsistent, and merits review by this Court.

CONCLUSION

For the reasons explained above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK E. ROBINSON
Counsel of Record
BENISTAR
2187 Atlantic Street
Stamford, CT 06902
(203) 969-6000

Counsel for Petitioners

Of Counsel:

ARTHUR R. MILLER
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

APPENDIX

APPENDIX A — AMENDED ORDER AND MEMORANDUM OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT ENTERED JUNE 26, 2008

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
No. SJC-10041

GAIL A. CAHALY

vs.

BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC. & others[1] (and six companion cases[2]).

---

1. Benistar Ltd.; Benistar Employer Services Trust Corporation (BESTCO); Benistar Admin. Services, Inc. (BASI); Carpenter Financial Group, LLC (CFG); Molly Carpenter; Daniel E. Carpenter; Merrill Lynch, Pierce, Fenner & Smith, Inc.; and U.S. Property Exchange.

2. Jeffrey M. Johnston *vs.* Benistar Property Exchange Trust Company, Inc., & others. Massachusetts Lumber Company, Inc. *vs.* Benistar Property Exchange Trust Company, Inc., & others. Bellemore Associates, LLC *vs.* Benistar Property Exchange Trust Company, Inc., & others. Joseph Iantosca & others vs. Benistar Property Exchange Trust Company, Inc., & others. R & B Enterprises, Inc. *vs.* Benistar Property Exchange Trust Company, Inc., & others. Byron Darling *vs.* Benistar Property Exchange Trust Company, Inc., & others.

Appendix A

AMENDED ORDER AND MEMORANDUM

In *Cahaly* v. *Benistar Property Exchange Trust Company* (and six companion cases), 451 Mass. 343 (2008), (*Cahaly*) we affirmed a judgment against the defendants Benistar Properties Exchange Trust (Benistar Trust); Benistar Ltd.; Benistar Employer Services Trust Corporation (BESTCO); Benistar Admin. Services, Inc. (BASI); Carpenter Financial Group, LLC (CFG); Molly Carpenter; Daniel E. Carpenter; and U.S. Property Exchange (collectively the Benistar defendants).

The Benistar defendants have filed a petition for rehearing in which they argue, inter alia, that the assertion of personal jurisdiction over certain of them[3] meets neither the requirements of the Massachusetts long-arm statute, G. L. c. 223A, § 3, nor the requirements of the Due Process clause of the Fourteenth Amendment of the United States Constitution.

The petition is denied in all respects. This amended order and memorandum addresses the issue of jurisdiction only.

In *Cahaly*, *supra*, we affirmed that it was appropriate to pierce the corporate veil (disregard the

---

3. The defendants who claim that there is no jurisdiction over them are Benistar Ltd.; Benistar Employer Services Trust Corporation (BESTCO); Benistar Admin. Services, Inc. (BASI); Carpenter Financial Group, LLC (CFG); Molly Carpenter; and Daniel E. Carpenter.

corporate form) of Benistar Trust. In their petition the Benistar defendants do not challenge that Massachusetts courts have jurisdiction over Benistar Trust. Contrary to their claim, under both the Massachusetts long-arm statute and Federal law, the doctrine of piercing the corporate veil (appropriately disregarding the corporate form) may properly play a role in determining whether a defendant is subject to personal jurisdiction. This case is one in which piercing the corporate veil was so obviously appropriate that imputing the conduct of Benistar Trust to the other Benistar defendants is well within the range of what the law of personal jurisdiction permits.

The facts found by the trial judge supporting disregarding the corporate form (piercing the corporate veil), all of which are supported by the evidence and none of which are challenged by the Benistar defendants in their petition, include the following: There was common ownership of the various corporate entities where Daniel Carpenter owned Benistar Limited, of which BASI was a wholly owned subsidiary, and also owned CFG; either alone or with Molly Carpenter he owned BESTCO; and either Daniel, Daniel and Molly, or Benistar Ltd. owned Benistar Trust.[4] Daniel Carpenter exercised pervasive control over all of the entities, with participation from Molly Carpenter as to the activities of Benistar Trust

4. As to U.S. Property, the trial judge found, and the evidence supported, that U.S. Property was "clearly the successor" to Benistar Trust, operating the same business out of the same Newton, Massachusetts office with the same computers and software and the same president, Martin Paley.

and substantial participation by Molly Carpenter as to BASI. There was substantial evidence of a confused intermingling of assets and activities in the form of "a significant number of large fund transfers between and among" all the entities; and "all of these entities had a common principal place or places of business" at two Connecticut addresses. Daniel Carpenter presented the companies "as one group, with a common set of 28 employees and assets of $50 million, and for all of which he, as 'chairman,' was the only person with check-signing authority" for purposes of applying for insurance; the companies' services were advertised together on the Benistar website; and clients of Benistar Trust "were specifically assured that their money was safe with that company because it was part of Benistar." As to capitalization, "none of the defendant companies was adequately capitalized for the conduct of legitimate business." There was a near-total lack of observance of corporate formalities: While each of the entities was organized as a Delaware corporation, and some appeared to have (form) bylaws, there was no evidence of stockholder or director meetings, the keeping of corporate minutes or other corporate records. Corporate records were entirely absent. There was no evidence of payment of dividends.

Benistar Trust was insolvent as of January 2001. The judge found that "[t]he only officers or directors of any of these corporations, Benistar [Trust] included, who functioned as such, were Daniel and Molly." Benistar Trust was used as "a source of funds to support Daniel's personal penchant for risky option trading on the stock

market," and that Benistar Trust was used to promote fraud. In light of these factual findings, all supported by the evidence, the conclusion to pierce the corporate veil was more than amply supported.[5]

The efforts of the Benistar defendants to insulate themselves from liability on grounds of corporate form, when all the corporate forms were created and controlled by Daniel Carpenter with assistance from Molly Carpenter, are unavailing under Massachusetts law,[6] a conclusion strengthened by the adverse

---

5. The petition does not press various additional arguments asserted in the defendants' briefs as to the exercise of personal jurisdiction over Molly Carpenter, and we need not address them here. We note, however, the trial judge properly drew adverse inferences from Molly Carpenter's decision to invoke her Fifth Amendment privilege against self-incrimination in response to questions regarding her own contacts with Massachusetts and her involvement with trading, and converting, the plaintiffs' funds. In addition there was affirmative evidence that Molly Carpenter, a director and officer of Benistar Trust, was involved with the scheme at issue in this case to the extent that she "gave directions to Merrill Lynch and PaineWebber personnel on a few occasions with respect to the handling or disposition of certain funds that Benistar Property either was sending to, or had previously deposited with, the brokerage firms," and may have also directed brokers to buy or sell stocks or options with the Benistar Trust funds.

6. The defendants claim that Delaware law should control this issue. Massachusetts and other authority support the decision of the trial judge to apply the law of the jurisdiction where the underlying conduct took place (Massachusetts), (Cont'd)

inferences correctly drawn from these defendants' assertion of their Fifth Amendment privileges and refusal to submit to questioning on issues relevant to personal jurisdiction.

(Cont'd)

rather than the place of incorporation (Delaware). See, e.g., *Evans* v. *Multicon Constr. Corp.*, 30 Mass. App. Ct. 728, 737 n.7 (1991) (applying Massachusetts law to issue of piercing corporate veil because "the place of contracting, the place of negotiation of the contract, the place of performance of the contract, and the place of the subject matter of the contract were in Massachusetts"). Even were we to agree that Delaware law should govern, it would make no difference because there was more than ample justification for disregarding the corporate form under either Massachusetts or Delaware law.

In Massachusetts, the law of piercing the corporate veil "differs in no material respect from the description in *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998)," *Scott* v. *NG US 1*, 450 Mass. 760, 768 (2008). Delaware law similarly permits a court to pierce the corporate veil of an entity "where there is fraud or where [the entity] is in fact a mere instrumentality or alter ego of its owner." *Geyer* v. *Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992). "A subsidiary corporation may be deemed the alter ego of its corporate parent where there is a lack of attention to corporate formalities, such as where the assets of two entities are commingled, and their operations intertwined. . . [or] where a corporate parent exercises complete domination and control over its subsidiary." *Mobil Oil Corp.* v. *Linear Films, Inc.*, 718 F. Supp. 260, 266 (D. Del. 1989); see also *Fletcher* v. *Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995). As the facts in this case well illustrate, under either Massachusetts or Delaware law, this case is almost a paradigm for piercing the corporate veil.

Appendix A

The fundamental argument of the Benistar defendants in their petition is that the determination of personal jurisdiction should be made before and not in light of the trial judge's findings on piercing the corporate veil. This is not the law under either the Massachusetts long-arm statute[7] or the Due Process clause. Under Massachusetts law, ownership of a Massachusetts subsidiary does not, of course, automatically confer jurisdiction over a parent corporation, *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980), nor does jurisdiction over a corporation automatically secure jurisdiction over its officers. *Kleinerman* v. *Morse*, 26 Mass. App. Ct. 819, 824 (1989). However, the combination of intermingling of officers and directors, and controlling the operations of a Massachusetts subsidiary, is sufficient to satisfy the long-arm statute. As the Appeals Court held in *Kleinerman* v. *Morse*, *supra* at 823:

> "Significant exercise of control by an out-of-State parent corporation over a subsidiary and significant intermingling of officers and directors between parent and subsidiary have served to establish jurisdiction in the State where the subsidiary is conducting its business operations. *Willis* v. *American Permac, Inc.*, 541 F. Supp. 118, 122 (D. Mass.

---

7. For purposes of this inquiry we apply Massachusetts, not Delaware, law, regardless of what law applied to the veil-piercing question. See, e.g., *Good Hope Indus., Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979) (explaining Massachusetts law of personal jurisdiction).

1982). Cf. *My Bread Baking Co.* v. *Cumberland Farms, Inc.*, 353 Mass. 614, 618-619 (1968). Running the operations of a subsidiary in Massachusetts constitutes a breadth of business activity that necessarily involves exercise of the privilege of conducting business here. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). Compare *Good Hope Indus.* v. *Ryder Scott Co.*, 378 Mass. 1, 6-12 (1979); *Balloon Bouquets, Inc.* v. *Balloon Telegram Delivery, Inc.*, 18 Mass. App. Ct. 935, 935-936 (1984); *Gunner* v. *Elmwood Dodge, Inc.*, 24 Mass. App. Ct. 96, 100-101 (1987). By contrast, ownership alone of the controlling stock of a subsidiary does not confer jurisdiction over an out-of-State parent corporation if the parent does not exercise control over the activities of the subsidiary. *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980)." [8]

Despite the efforts of the Benistar defendants to argue otherwise, Federal due process requirements, which form the second prong of the personal jurisdiction inquiry, are not to the contrary. Here too jurisdiction over a parent corporation does not "automatically establish jurisdiction over a wholly owned subsidiary."

---

8. Although *Kleinerman* v. *Morse*, 26 Mass. App. Ct. 819 (1989), does not state its holding in terms of piercing the corporate veil, piercing the corporate veil requires, if anything, a higher degree of control and elements of fraudulent conduct, than does the test in *Kleinerman*.

Keeton v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). However, where the corporate form may be disregarded, as it was appropriately done in this case, imputing the contacts of the subsidiary with the forum state to the parent comports with due process. See *Epps* v. *Stewart Info. Servs. Corp.*, 327 F.3d 642, 648-649 (8th Cir. 2003); *Lakota Girl Scout Council, Inc.* v. *Havey Fund-Raising Mgt., Inc.*, 519 F.2d 634, 637 (8th Cir. 1975).

> "Although [the parent], in its own right, lacked sufficient minimum contacts with Massachusetts to permit the assertion of jurisdiction over its corporate person, [the subsidiary] was unarguably subject to the jurisdiction of the Massachusetts courts. Hence, if [the subsidiary]'s contacts can be attributed to [the parent], then the jurisdictional hurdle can be vaulted."

United Elec., Radio and Mach. Workers of Am. v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992).

Not every case dealing with the question of personal jurisdiction over nonresident parent corporations invokes the doctrine of piercing the corporate veil by name. The underlying principle, however, is clear. "Since the essence of personal jurisdiction is to bring responsible parties before the court, a corporation which is actually responsible for its subsidiary's decision to undertake instate activities should, in all fairness, be within the state courts' jurisdictional reach." *Donatelli*

v. *National Hockey League*, 893 F.2d 459, 466 (1st Cir. 1990). The defendants' attempt to circumvent this authority through an analogy to the purportedly "similar" theory that was rejected in *Rush* v. *Savchuk*, 444 U.S. 320 (1980), is unavailing. That case did not involve in any respect piercing the corporate veil, parent corporations, or subsidiaries.

The relief granted in this case was appropriate where Massachusetts had personal jurisdiction over corporate entities and individuals to whom actions establishing personal jurisdiction in Massachusetts have been attributed.

The petition for rehearing is denied.

By the Court
(Cowin, Botsford, JJ., recused),

s/ Susan Mellen
Susan Mellen, Clerk

ENTERED: June 26, 2008

APPENDIX B — OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK DATED MAY 8, 2008

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK

Suffolk, January 7, 2008—May 8, 2008.

GAIL A. CAHALY

vs.

BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC., & others[1] (and six companion cases[2]).

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, & CORDY, JJ.

---

1. Benistar Ltd.; Benistar Employer Services Trust Corporation; Benistar Admin. Services, Inc.; Carpenter Financial Group, LLC; Molly Carpenter; Daniel E. Carpenter; Merrill Lynch, Pierce, Fenner & Smith, Inc.; and U.S. Property Exchange.

2. Jeffrey M. Johnston *vs.* Benistar Property Exchange Trust Company, Inc., & others. Massachusetts Lumber Company, Inc. *vs.* Benistar Property Exchange Trust Company, Inc., & others. Bellemore Associates, LLC *vs* . Benistar Property Exchange Trust Company, Inc., & others. Joseph Iantosca & others *vs.* Benistar Property Exchange Trust Company, Inc., & others. R & B Enterprises, Inc. *vs.* Benistar Property Exchange Trust Company, Inc., & others. Byron Darling *vs.* Benistar Property Exchange Trust Company, Inc., & others.

Appendix B

Practice, Civil, Relief from judgment, Judgment notwithstanding verdict, New trial, Discovery. *Evidence*, Disclosure of evidence. *Judgment*, Relief from judgment. *Fiduciary. Conversion. Fraud. Jurisdiction*, Personal.

MARSHALL, C.J. In this appeal we principally consider two questions: first, whether a Superior Court judge properly granted judgment notwithstanding the verdict (judgment n.o.v.) to a defendant on the ground of an "evidentiary gap" in the plaintiffs' claims, and second, whether she then properly vacated the judgment n.o.v. and allowed the plaintiffs' motions for a new trial based on "newly discovered evidence" that might close that gap. See Mass. R. Civ. P. 50(a), 365 Mass. 814 (1974) (judgment n.o.v.), and Mass. R. Civ. P. 60(b)(2), 365 Mass. 828 (1974) (postjudgment relief on ground of newly discovered evidence).[3] We affirm.

1. *Procedural background.* The plaintiffs in these consolidated actions contracted with the defendant Benistar Property Exchange Trust Company, Inc. (Benistar Trust) to hold their funds in escrow while they engaged in tax-advantaged "like-kind" property exchanges in accordance with Internal Revenue Code, 26 U.S.C. § 1031 (2006) (§ 1031).[4] Rather than

3. The trial judge treated the plaintiffs' motion, which was styled as a motion for reinstatement of the jury verdict, as a motion for a new trial, allowed the motion, and granted that relief.

4. Title 26 U.S.C. § 1031 (2006) allows a seller of property to defer recognition of a capital gain on certain real estate (Cont'd)

safeguarding the plaintiffs' funds in escrow accounts—as its fiduciary and contractual duties to the plaintiffs required—Benistar Trust deposited the funds in margin accounts at Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), and later at UBS PaineWebber Inc. (PaineWebber), and used the funds to engage in high-risk uncovered option trading. Benistar Trust ultimately lost more than $8 million of the plaintiffs' funds.[5]

Beginning in January, 2001, the plaintiffs filed actions against Benistar Trust, Daniel Carpenter (its owner), Molly Carpenter (its managing director and treasurer; Daniel is her husband), Martin Paley (its president), a series of entities affiliated with Benistar Trust that were also controlled by Daniel and Molly Carpenter,[6] Merrill Lynch, and PaineWebber. The

---

(Cont'd)

transactions by using the proceeds of the sale to purchase "like-kind" property within 180 days. 26 U.S.C. § 1031(a)(3). In order to take advantage of this rule, the funds must be transferred to an escrow account, qualified trust, or qualified intermediary pending the purchase of replacement property. Benistar Trust advertised itself as a "qualified intermediary" under § 1031.

5. The jury awarded $8,644,150 in compensatory damages to the plaintiffs, divided in the following way to reflect each plaintiff's losses: Gail Cahaly, $992,230; Jeffrey Johnston, $541,930; Massachusetts Lumber, $3,237,190; Joseph Iantosca, $2,913,306.86; Belridge Corporation, $514,834.14; and Bellemore Associates, $444,659.

6. Benistar Admin. Services, Inc.; Benistar Employer Services Trust Corporation; Benistar Ltd.; Carpenter Financial

(Cont'd)

plaintiffs asserted claims against all of the defendants, including breach of contract, conversion, breach of fiduciary duty, intentional misrepresentation, and violation of G.L. c. 93A. In addition, the plaintiffs alleged that Merrill Lynch and PaineWebber aided and abetted Benistar Trust's conversion and breach of fiduciary duty and violated the Connecticut Unfair Trade Practices Act and the New York Consumer Protection Act.[7]

In March, 2002, the trial judge, who presided over nearly the entirety of this litigation in the business litigation session of the Superior Court, allowed the plaintiffs' motion for summary judgment on their claims against Benistar Trust for breach of contract and conversion. In July, 2002, the judge allowed PaineWebber's motion for summary judgment on the plaintiffs' claims against it. See note 11, *infra*. After fourteen days of trial on the remaining claims, during November and December, 2002, and having heard testimony from more than a dozen witnesses, a jury

---

(Cont'd)
Group, LLC; and U.S. Property Exchange. For simplicity, we shall sometimes refer collectively to Benistar Trust, Daniel Carpenter, Molly Carpenter, Martin Paley, and the named affiliated entities as the "Benistar defendants." We shall refer to Daniel Carpenter as "Carpenter."

7. The plaintiffs' various complaints list additional causes of action against Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), and some of the other defendants that were dismissed during the litigation, do not appear to have been litigated, or otherwise have no bearing on this appeal.

found Benistar Trust, Carpenter, Molly Carpenter,[8] and Paley liable on all of the plaintiffs' common-law claims. They found Merrill Lynch liable for aiding and abetting conversion, aiding and abetting breach of fiduciary duty, and for violating the New York and Connecticut consumer protection statutes.[9]

However, in February, 2003, the judge allowed Merrill Lynch's motion for judgment n.o.v. on the ground that the plaintiffs had failed, as a matter of law, to present sufficient evidence that Merrill Lynch either had "actual knowledge" of the Benistar defendants' wrongful acts or provided "substantial assistance" to Benistar's wrongdoing, as required under New York law, which controlled the claims.[10] See, e.g., *S & K Sales Co.*

---

8. The only claim before the jury with respect to Molly Carpenter was breach of fiduciary duty as to three of the plaintiffs: Joseph Iantosca, Belridge Corporation, and Bellemore Associates. The jury found her liable to all three. Not every cause of action was asserted against each of the other Benistar defendants, a fact that has no bearing on this appeal.

9. After a separate bench trial in March, 2003, the judge found the Benistar defendants, with the exception of Molly Carpenter, liable under G.L. c. 93A, and awarded attorney's fees to the plaintiffs. In September, 2003, after a further separate bench trial, the judge found that it was necessary and appropriate to pierce the corporate veil and extend liability to the remaining Benistar defendants, five corporations controlled by Daniel and Molly Carpenter. See note 6, *supra*.

10. The judge also granted judgment n.o.v. on the New York and Connecticut statutory claims for reasons derivative of her setting aside the jury's verdicts on the aiding and abetting claims.

v. Nike, Inc., 816 F.2d 843, 847-848 (2d Cir.1987) (defining elements of aiding and abetting claim under New York law). See also *infra*.

In a posttrial motion, the plaintiffs brought forward evidence that they asserted was "newly discovered" and would address the deficiencies the judge had identified in granting judgment n.o.v. to Merrill Lynch. The judge allowed the plaintiffs' motion for a new trial under rule 60(b)(2), based on the new evidence. She reported her decision, along with her previous decision to grant judgment n.o.v. to Merrill Lynch, to the Appeals Court, under Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996), see *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 261 n. 4, 612 N.E.2d 1158 (1993). She also entered a final judgment against the Benistar defendants under Mass. R. Civ. P. 54(b), 365 Mass. 820 (1974), from which the Benistar defendants appealed. The Appeals Court considered all issues together, and affirmed. *Cahaly v. Benistar Property Exch. Trust Co.*, 68 Mass.App.Ct. 668, 864 N.E.2d 548 (2007). Merrill Lynch and the Benistar defendants each filed an application for further appellate review; the plaintiffs filed an opposition. We granted further appellate review.[11]

---

11. The plaintiffs' claims against UBS PaineWebber, Inc. (PaineWebber), are not before us. PaineWebber prevailed on those claims in the Superior Court and in the Appeals Court. The plaintiffs neither sought further appellate review of their claims against PaineWebber nor requested, in their opposition to the applications for further appellate review filed by the other defendants, that this court also review their claims against

(Cont'd)

Appendix B

2. *Factual background.*[12] The jury could have found the following: Benistar Trust was a registered Delaware corporation with a principal place of business in Massachusetts. It was one of a number of business entities set up and controlled by Carpenter, a tax attorney and Connecticut resident. Carpenter was the chairman and sole shareholder of Benistar Trust. His wife, Molly Carpenter, was its managing director and treasurer, and Paley, a Massachusetts resident, was its president.[13]

(Cont'd)
PaineWebber in the event that one or both of the other defendants' applications was allowed. The applications filed by the other defendants (Merrill Lynch and the Benistar defendants) did not seek relief against PaineWebber. See *Bradford v. Baystate Med. Ctr.*, 415 Mass. 202, 204, 613 N.E.2d 82 (1993) ("as to a multiple party, multiple issue case . . . a party successful in the Appeals Court [such as PaineWebber] as to whom an application for further appellate review does not seek relief need not be concerned with the proceedings before us involving other parties"); *Ford v. Flaherty*, 364 Mass. 382, 386-387, 305 N.E.2d 112 (1973) (plaintiff's claims against third-party defendant not before the court because no further appellate review of any claim against it was sought).

12. We recite only such facts as are pertinent to our inquiry, reserving recitation of certain facts for later discussion.

13. At their depositions, the Benistar Trust principals, Carpenter, Paley, and Molly Carpenter invoked their right to remain silent under the Fifth Amendment to the United States Constitution in answer to every question put to them. At her
(Cont'd)

Appendix B

The plaintiffs are individuals and entities who in 2000 entered into written agreements with Benistar Trust in order to secure for themselves the tax benefits of § 1031 in connection with sales and purchases of real estate.[14] See note 4, *supra*. These agreements, in essence, obligated Benistar Trust (1) to hold the funds that each plaintiff derived from the sale of real property in a Merrill Lynch "escrow custodial account" in the form of either a six per cent "investment account" or a three per cent money market account, at each plaintiff's election; (2) to transfer a plaintiff's escrow funds to any seller of "replacement property," designated by the plaintiff at such time and in such manner as the plaintiff specified, see note 4, *supra;* and (3) if the plaintiff failed to locate a suitable replacement property within the time permitted under § 1031, to return the escrow funds, with the applicable interest, to the plaintiff.

In October, 1998, Carpenter opened accounts at Merrill Lynch for various of his enterprises, including four accounts for Benistar Trust. These were corporate

---

(Cont'd)

deposition, Molly Carpenter invoked both the "spousal privilege" and "all other applicable privileges"; the judge determined that only the Fifth Amendment protection against self-incrimination applied. At trial, Paley again responded to every question by invoking his Fifth Amendment rights. Carpenter and Molly Carpenter did not appear at trial.

14. Benistar Trust charged the plaintiffs a flat fee for its services as a § 1031 qualified intermediary.

working capital accounts, and not custodial, depository, or escrow accounts. His account advisors for all of the Benistar accounts were Gary Stern and Gerald Levine, financial advisors with Merrill Lynch's private client group. In setting up the accounts, Carpenter forwarded to Merrill Lynch Benistar Trust's certificate and articles of incorporation, bylaws, and corporate resolutions authorizing the opening of the accounts. None of these documents identified the nature of Benistar Trust's business as a § 1031 qualified intermediary.[15] Carpenter signed written representations that the money in the *349 Benistar Trust accounts belonged to Benistar Trust. Additionally, Carpenter identified his investment objective as "income" and his "account risk factor" as "aggressive." He requested and received permission from Merrill Lynch to engage in uncovered option trading[16] in one of the Benistar Trust accounts, after

---

15. The Merrill Lynch account opening documents, prepared by Gerald Levine and signed by Carpenter and (in some cases) Molly Carpenter, identified the business of Benistar Trust as "real estate transactions" and "real estate," information that Levine testified came directly from Carpenter.

16. An "uncovered" option strategy involves contracting to buy or sell a particular security, which one does not own, on a date in the future, for an agreed price. Because the actual price of the security on the date when the option expires may be much higher or lower than the agreed price, large gains or losses may result. For uncovered calls, in which one contracts to sell at an agreed price, the potential losses are unlimited.

signing a document acknowledging his understanding that uncovered options posed "special risks . . . [for] potentially significant losses."[17]

Carpenter was, as he stated on the account form, an "aggressive" investor. As soon as the accounts were opened, he engaged in high-volume, high-risk uncovered trading in puts and calls, concentrating almost exclusively in the then-booming technology sector. Carpenter often spent one hour or more each day on the telephone with Levine or Stern discussing possible trades, consuming far more of their time than their other clients. However, Benistar's trades were "totally unsolicited," meaning that Carpenter himself controlled all investment decisions.[18] He paid little heed to Stern's and Levine's repeated admonitions to temper his trading style by broadening his portfolio into other sectors and choosing some safer investments.

---

17. Although Merrill Lynch authorized Carpenter to engage in uncovered option trading in several Benistar Trust accounts, most of the option trading was done through one Benistar Trust account identified at trial as the "B10 account." For the sake of convenience, we shall refer hereafter to the Benistar Trust "account," in the singular.

18. As the judge stated in her memorandum of decision and order on the plaintiffs' claims pursuant to G.L. c. 93A, the evidence showed that Carpenter "was unquestionably the person entirely or virtually entirely responsible for authorizing and directing the uncovered option trading with the plaintiffs' funds" at Merrill Lynch.

Appendix B

Carpenter's investment strategy at first yielded profitable returns, but by the spring of 2000, as the "dot-com boom" of the late 1990's began to flatten out, his accounts sustained heavy losses.[19] Merrill Lynch administrative manager Thomas Rasmussen, branch manager Hassan Tabbah, and members of Merrill Lynch's compliance department were concerned about these losses. On September 20, 2000, Rasmussen directed Levine to inform Carpenter that Merrill Lynch would no longer permit Carpenter to open uncovered positions in the Benistar Trust account. On Stern's recommendation, Carpenter moved his accounts to PaineWebber in October, 2000, where, in less than three weeks, Benistar Trust lost between $1.2 and $1.3 million. By the end of December, 2000, PaineWebber began closing out positions in the Benistar account.

We turn now to the decision of the judge to grant Merrill Lynch's motion for judgment n.o.v.

3. *Judgment notwithstanding the verdict.* a. *Standard of review.* Because the jury are a pillar of our justice system, nullifying a jury verdict is a matter for the utmost judicial circumspection. The touchstone is reasonableness. We ask whether, construing the evidence most favorably to the plaintiff, and "without weighing the credibility of the witnesses or otherwise

---

19. A Merrill Lynch memorandum introduced in evidence notes that Carpenter "was up approximately $200,000 near the end of March 2000 and dropped about $1,000,000 over the option expiration period of April and May."

considering the weight of the evidence, the jury reasonably could have returned a verdict for the plaintiff. . . . To be reasonable, the inference [or conclusion] 'must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture.' " *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 55, 819 N.E.2d 550 (2004), quoting *Tosti v. Ayik*, 394 Mass. 482, 494, 476 N.E.2d 928 (1985), and *McEvoy Travel Bur., Inc. v. Norton Co.*, 408 Mass. 704, 706 n. 3, 563 N.E.2d 188 (1990). See *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944). "[We] consider whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn' in favor of the nonmoving party." *Phelan v. May Dep't Stores Co., supra*, quoting *McEvoy Travel Bur., Inc. v. Norton Co., supra*. With these principles in mind, we turn now to the merits.

b. *Aiding and abetting liability.* The claims against Merrill Lynch for aiding and abetting breach of fiduciary duty and aiding and abetting conversion arise under New York common law, where it is well settled that the plaintiff must show "(i) the existence of a violation by the primary wrongdoer; (ii) knowledge of this violation by the aider and abettor; and (iii) proof that the aider and abettor substantially assisted in the primary wrong." *Ryan v. Hunton & Williams*, U.S. Dist. Ct., No. 99-CV-5938 (JG), 2000 WL 1375265 (E.D.N.Y. Sept. 20, 2000). See *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847-848 (2d Cir.1987); *Mazzaro de*

Appendix B

Abreu v. Bank of Am. Corp., 525 F.Supp.2d 381, 387 (S.D.N.Y.2007); *A.I.A. Holdings, S.A. v. Lehman Bros.*, U.S. Dist. Ct., No. 97 Civ. 4978(LMM), 2002 WL 88226 (S.D.N.Y. Jan. 23, 2002); *Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 470 (S.D.N.Y.2001); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, U.S. Dist. Ct., No. 98 Civ. 4960(MBM), 1999 WL 558141 (S.D.N.Y. July 30, 1999); *Williams v. Bank Leumi Trust Co.*, U.S. Dist. Ct., No. 96 Civ. 6695(LMM), 1997 WL 289865 (S.D.N.Y. May 30, 1997); *Kolbeck v. LIT Am., Inc.*, 939 F.Supp. 240, 245 (S.D.N.Y.1996), aff'd, 152 F.3d 918 (2d Cir.1998). See also Restatement (Second) of Torts § 876(b) (1977) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . ."). The plaintiffs have cleared the first hurdle of the evidentiary requirements: establishing that the Benistar defendants both breached their fiduciary duties to them and wrongfully converted their funds. The question is whether they provided evidence sufficient for the jury reasonably to conclude that Merrill Lynch had "knowledge of" and "substantially assisted" the Benistar defendants. *Ryan v. Hunton & Williams*, *supra*. The plaintiffs concede that the lengthy trial did not yield direct evidence of knowledge or substantial assistance. They argue, however, that the "indirect, circumstantial evidence" of these two elements was "overwhelming." No jury reasoning from the evidence, however, would have been overwhelmed.

c. *Knowledge of a violation.* We first consider whether, viewing the evidence in its light most favorable to the plaintiffs, the jury reasonably could have inferred that Merrill Lynch "knew" of the primary wrongs committed by the Benistar defendants. The knowledge requirement of a New York aiding and abetting claim demands a showing of "actual knowledge" of the underlying wrongdoing. See *Kolbeck v. LIT Am., Inc., supra* at 246, and cases cited. That the aiding and abetting defendant has been proven to have had notice or "constructive knowledge" of the underlying wrong will not suffice. See, e.g., *Ryan v. Hunton & Williams, supra* (on motion to dismiss, allegations that defendant suspected underlying fraud insufficient to aver "actual knowledge"). See also *Kolbeck v. LIT Am., Inc., supra* at 248 (absent fiduciary duty to plaintiff, defendants' knowledge of accusations of fraud against primary wrongdoer insufficient to impute requisite "actual knowledge" for purposes of aiding and abetting liability).[20] The plaintiffs are not required to produce a "smoking gun," however. Actual knowledge "may be implied from a strong inference of fraudulent intent," *Mazzaro de Abreu v. Bank of Am. Corp., supra* at 388.

On appeal the plaintiffs set out six "categories of evidence" that they argue form the basis of a reasonable

---

20. It is uncontested that Merrill Lynch did not owe a fiduciary duty to the plaintiffs. See *Morin v. Trupin*, 823 F.Supp. 201, 207 (S.D.N.Y.1993) (broker of packaged real estate deals does not owe fiduciary duty to plaintiffs where he had "no control" over materials forming basis of primary tortfeasor's fraud).

inference that Merrill Lynch had "actual knowledge" of the Benistar defendants' underlying wrongdoing. They also argue that the jury could reasonably have inferred actual knowledge from disbelief of the Merrill Lynch defendants' testimony. On both points, we disagree.

As to evidence, the plaintiffs rely strongly on a September 22, 2000, letter Carpenter wrote to Rasmussen, protesting Merrill Lynch's decision to prohibit opening new positions in the Benistar Trust account.[21] In the letter Carpenter stated, among other things: "We have chosen Merrill [Lynch] as our depository for our clients so we cannot move the funds elsewhere. If we cannot trade at Merrill [Lynch], we

---

21. In the September 22, 2000, letter, Carpenter stated that he was writing "to lodge an official complaint" about Merrill Lynch's prohibiting Benistar Trust from opening new positions. There was considerable testimony at trial about whether the letter constituted the type of complaint that was required to be reported to the Securities and Exchange Commission (SEC). Robert Lau, an expert testifying on behalf of Merrill Lynch, Rasmussen, and Duffy, and the Merrill Lynch attorney to whom he referred the letter all testified that the letter was not the type of complaint required to be reported to the SEC. The judge, correctly in our view, rejected the plaintiffs' argument that the Merrill Lynch defendants' testimony on this matter was false and therefore probative evidence of liability, see *Boston v. Santosuosso*, 307 Mass. 302, 349, 30 N.E.2d 278 (1940), on the ground that testimony about whether the letter constituted a reportable complaint was "confusing" and that, in any event, had Merrill Lynch reported the letter as a "complaint," the form in which it was required to do so would not have triggered further investigation by any regulatory authority "or anyone else."

cannot trade anywhere, and you will have doomed us to our losses in a volatile market that we were perfectly positioned to profit from." To the plaintiffs, the words "depository" and "clients" were sufficient to inform Merrill Lynch that the Benistar Trust account contained third-party funds *and* that Carpenter was appropriating those funds for his own use in violation of his fiduciary duty to the third parties.[22, 23] The link posited by the plaintiffs requires many intermediate conclusions for

---

22. In further support of this assertion, the plaintiffs point to evidence from a section of the Merrill Lynch "Compliance Outline" (an internal document distributed to brokers in its private client division) on "Money Laundering, Con Games and Trading Abuses" that advises brokers to avoid schemes using "intermediate" or "depository" accounts. The reference does not define "depository" but does indicate that such accounts are held for the benefit of third parties. In any event, it is insufficiently revelatory of the tortious conduct at issue reasonably to lead to an inference that Merrill Lynch had "actual knowledge" of the Benistar defendants' wrongs.

23. It is undisputed that, based on the *trial evidence*, no one at Benistar Trust directly informed anyone at Merrill Lynch that the funds in the Benistar Trust account belonged to third parties and that Carpenter was misusing those funds in violation of his agreements with those third parties. Levine, Rasmussen, Stern, and Duffy testified that Carpenter had told them that the money in the accounts was all his. Moreover, Rasmussen, Levine, and Merrill Lynch attorney Kevin Duffy all testified, without contradiction, that they considered the reference to "clients" to mean Carpenter's or Benistar's other companies. Stern and Levine also testified that they considered Benistar Trust and Carpenter to be one and the same for purposes of the Merrill Lynch accounts.

which there was no evidence: for instance, that the funds in the Benistar Property account were third-party funds contractually required to be held in escrow and that Benistar Trust's agreements with the third parties did not permit using the funds for speculative trading. Even assuming, arguendo, that the letter signified that Benistar Trust had some unspecified fiduciary duty to third-party clients relevant to the corporate accounts, the "relevant 'knowledge' for liability to attach in a fiduciary's breach of duty is knowledge as to the primary violator's status as a fiduciary *and* knowledge that the primary's conduct contravenes a fiduciary duty" (emphasis added). *A.I.A. Holdings, S.A. v. Lehman Bros., supra,* quoting *Diduck v. Kaszycki & Sons Contrs.*, 974 F.2d 270, 282-283 (2d Cir.1992). It takes a leap in speculation, an impermissible leap for a jury, to tie the September 22 letter to Merrill Lynch's "actual knowledge" of the underlying tortious behavior. See *Sheehan v. Goriansky,* 317 Mass. 10, 17, 56 N.E.2d 883 (1944), quoting *Davis v. Boston Elevated Ry.*, 222 Mass. 475, 479, 111 N.E. 174 (1916) (jury's conclusion must be "the result of logical reasoning from established facts").

The plaintiffs' second category of evidence is similarly unpersuasive. This category of evidence is comprised of Rule 405 of the Rules of the New York Stock Exchange, Rule 3210 of the Rules of the National Association of Securities Dealers, and Merrill Lynch compliance policies that, in summary, require a broker or financial adviser to use "due diligence" to "know the client" when opening and managing the client's investment accounts. The plaintiffs argue that, because

Stern and Levine both testified that they complied with the "know your client" rules, the jury reasonably could conclude that Stern and Levine, and thus Merrill Lynch, knew about the nature of Benistar Trust's business[24] and also the nature of its wrongdoing.[25] The jury might have believed Stern's and Levine's testimony that they followed the "know your client" rules, in which case the jury reasonably could infer that Stern and Levine knew the nature of Benistar Trust's services. Or the jury might have disbelieved the brokers, in which case they reasonably could infer that Stern and Levine failed to follow the "know your client" rules. Neither alternative translates to affirmative evidence that Merrill Lynch had actual knowledge that the Benistar Trust account contained third-party funds, and that Carpenter's high-risk options trading in the Benistar Trust account was in breach of its fiduciary duties.

Third, the plaintiffs laid before the jury voluminous documentary evidence of wire transfer authorizations

---

24. Several witnesses for Merrill Lynch testified that not only did they not know the actual nature of Benistar Trust's business as a "qualified intermediary" under § 1031, but they also had no understanding of § 1031 or its requirements until the first of the plaintiffs' lawsuits was filed in January, 2001.

25. The plaintiffs also argue that the words "property exchange" and "trust" in Benistar Trust's corporate name was a loud, clear announcement to Merrill Lynch of the nature of Carpenter's business and of the underlying tortious conduct. The references in Benistar Trust's corporate name are insufficient under New York law to support the scienter requirement of an aiding and abetting claim.

and wire transfer confirmations for the Benistar Trust account that indicated that substantial sums flowed constantly between Benistar Trust and various third-party bank accounts, attorney trust accounts, and other accounts of an evidently custodial nature.[26] A jury may well have agreed with the plaintiffs that Merrill Lynch's apparent indifference to the large volume of wire transfers was in derogation of its own written policies for detecting "con games" and "scams"[27] (although, as the judge noted, the heavy traffic in wire transfers in the Benistar Trust account was consistent with Carpenter's alleged representations to Merrill Lynch that Benistar Trust bought and sold real estate). At most, this conclusion leads reasonably to the inference that Merrill Lynch "should have been aware" of possible wrongdoings in the account. However, constructive knowledge is not "actual knowledge." See, e.g., *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F.Supp.2d 381, 388 (S.D.N.Y.2007) (knowledge of nature of transfers from bank account and large sums of money in account do not imply "actual knowledge of the underlying fraud");

---

26. The plaintiffs also introduced evidence that Merrill Lynch brokers were instructed that large volumes of wire transfer activity in an account may signal a fraudulent scheme and should be reported to the office of the general counsel.

27. In addition, a jury may well have agreed that such indifference violated Merrill Lynch's obligations under Rule 405 of the Rules of the New York Stock Exchange to "[u]se due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried. . . ."

Appendix B

Ryan v. Hunton & Williams, U.S. Dist. Ct., No. 99-CV-5938 (JG), 2000 WL 1375265 (E.D.N.Y. Sept. 20, 2000) (bank officer's authorization of large volume of transfers between primary defendant's account and subaccounts does "not create an inference of knowledge of" fraudulent scheme). See also *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, U.S. Dist. Ct., No. 98 Civ. 4960(MBM), 1999 WL 558141 (S.D.N.Y. July 30, 1999) (allegations of knowing or reckless disregard of irregularities in wire transfers and other "badges of fraud" do not give rise to inference, "let alone a 'strong inference' " of underlying fraud).

Fourth, the jury heard testimony concerning a telephone conference call on December 19, 2000, among Stern, PaineWebber compliance manager Lori Enright, Mitchell Rock (Stern's close friend and Benistar's broker at PaineWebber),[28] and Steven Feit (the PaineWebber branch manager) in response to PaineWebber's concern about losses in the Benistar account. Enright took notes of the conference. Both Feit's testimony (in deposition) and Enright's testimony and notes reflect that Stern told them that Benistar Trust acted "as a third party liaison for real estate transactions."[29] From what we have said above, it is clear that Stern's information is insufficient to prove actual knowledge of Benistar Trust's fraudulent schemes.

---

28. Rock's participation in the conference call was confined to making introductions.

29. Enright and Feit also testified that they did not ask Carpenter to elaborate on this description.

We need not discuss at length the plaintiffs' two remaining categories of evidence. Testimony from several Merrill Lynch employees that they viewed the Benistar Web site homepage (which did not contain a description of Benistar Trust's business) and a linked page that had nothing to do with § 1031 like-kind exchanges has no probative value in establishing Merrill Lynch's knowledge of the primary wrongdoing.[30] That Levine and Stern chose to respond to a memorandum from their compliance department requesting more information about Benistar Trust by ignoring the request and praising Carpenter as an individual cannot be converted into affirmative evidence of the underlying fraud, even if, as the plaintiffs maintain, Levine and Stern responded obliquely in order to continue reaping substantial commissions from Benistar. See *Mazzaro de Abreu v. Bank of Am. Corp., supra* at 388-389 (allegations of "profit motive"—garnering of "substantial" transaction fees-insufficient of itself to support inference of actual knowledge of underlying fraud generating fees).

The indirect, circumstantial evidence amassed at trial may suggest that Merrill Lynch knew the nature

---

30. Referring to Benistar's Web site, Hassan Tabbah testified without elaboration that he "hit the website," perhaps in Stern's presence. Stern testified that he merely glanced at the Web site once when he was in Tabbah's office, and Levine testified that the only link on the Benistar Web site that he visited concerned an unrelated tax strategy. These witnesses denied seeing any information on the Web site concerning Benistar Trust's role as a qualified intermediary for § 1031 plans.

of Benistar Trust's business. But it does not erase the evidentiary lacunae between Merrill Lynch's knowledge of Benistar Trust's services and knowledge that Benistar Trust was violating its fiduciary agreements to clients and converting client funds by trading in the Benistar Trust corporate account. Crucially, no evidence of Merrill Lynch's actual knowledge of Benistar's agreements with its clients was presented at trial. Cf. *Cronin v. Executive House Realty,* U.S. Dist. Ct., No. 80 Civ. 7254, 1982 WL 1303 (S.D.N.Y. May 5, 1982) (judgment n.o.v. not appropriate on claim for aiding and abetting under New York law where bank official was informed by one business partner that offering memorandum on which "loan write-up" was based misrepresented another partner's financial status).

Because the six categories of evidence do not support a permissible inference of actual knowledge, the plaintiffs gain nothing by claiming that their evidence acquires "independent, confirmatory force" when considered in light of the jury's presumed disbelief of the "implausible," "self-serving" and "after-the-fact" testimony of Merrill Lynch witnesses on key points. Nor can a jury's disbelief of the Merrill Lynch testimony reasonably be viewed as independent affirmative evidence supporting a conclusion that Merrill Lynch had the requisite actual knowledge of the Benistar

defendants' wrongful actions. None of the cases the plaintiffs rely on helps their cause.[31] There was no error.

---

31. See *Janigan v. Taylor*, 344 F.2d 781, 784-785 (1st Cir.1965) (evidence that, among other things, defendant was in charge of corporation and had detailed knowledge of its operations permitted jury to infer defendant's full knowledge of company's affairs from disbelief of his testimony of ignorance). See also *Sheehan v. Goriansky*, 317 Mass. 10, 16-17, 56 N.E.2d 883 (1944) ("The defendant urges that disbelief of testimony was not evidence to the contrary. . . . There was, however, more than mere disbelief of the defendant," including evidence of bloody glove on the deceased's chest); *Boston v. Santosuosso*, 307 Mass. 302, 349, 30 N.E.2d 278 (1940) ("disbelief of evidence is not the equivalent of affirmative evidence to the contrary. But where a material fact is established by evidence *and* it is shown that a defendant's testimony as to that fact was wilfully untrue, this circumstance not only furnishes a ground for disbelieving other testimony of this defendant . . . but also tends to show consciousness of guilt or liability on his part and has probative force in connection with *other* evidence on the issue of such guilt or liability" [emphases added]); *Commonwealth v. Geisler*, 14 Mass.App.Ct. 268, 274, 438 N.E.2d 375 (1982), quoting *Commonwealth v. Porter*, 384 Mass. 647, 653, 429 N.E.2d 14 (1981) (jury could fairly infer evidence of guilt from disbelief of automobile accident defendant's testimony where physical evidence such as location and condition of automobile, among other things, supported probable inference of liability; "[w]hile proof of mere consciousness of guilt alone may be insufficient to convict of crime . . . evidence of such a state of mind when coupled with other probable inferences, may be sufficient to amass the quantum of proof necessary to prove guilt"). See *Cronin v. Executive House Realty*, U.S.Dist.Ct., No. 80 Civ. 7254, 1982 WL 1303 (S.D.N.Y. May 5, 1982) (evidence of direct communication to aiding and abetting

(Cont'd)

d. *Substantial assistance of the wrongful conduct.* The judge also concluded that the plaintiffs had failed to prove the third prong of a New York aiding and abetting claim: that Merrill Lynch substantially assisted in furthering the Benistar defendants' wrongful conduct. See *Ryan v. Hunton & Williams, supra.* Our conclusion that the plaintiffs have not met their burden of showing that Merrill Lynch had actual knowledge of the Benistar defendants' underlying tortious conduct on the evidence adduced at trial, and our affirmance of the judge's order allowing a motion for a new trial on the claims against Merrill Lynch, make it unnecessary to address the issue of substantial assistance.[32]

We consider now whether the judge properly ordered a new trial on the claims against Merrill Lynch.

(Cont'd)
defendant of concerns about primary defendant's solvency and authority leads to inference that aiding and abetting defendant's actions in failing to conduct normal credit checks and accepting certain promissory notes furthered wrongdoing). Here, as described above, the plaintiffs failed at trial to produce the affirmative evidence that would have allowed a reasonable inference of actual knowledge to be drawn.

32. Our decision on the aiding and abetting claim makes it unnecessary to address the plaintiffs' parenthetical argument that the jury's verdicts in favor of the plaintiffs on the New York Consumer Protection Act and the Connecticut Unfair Trade Practices Act should be reinstated on the evidence presented concerning aiding and abetting.

4. *New trial under Mass. R. Civ. P. 60(b)(2).* In a posttrial motion, the plaintiffs brought forward evidence that they argued addressed the specific deficiencies in their case that led the judge to allow Merrill Lynch's motion for judgment n.o.v. We conclude that the judge did not abuse her discretion in granting the plaintiffs a new trial based on this evidence.

a. *Discovery.* The plaintiffs' request for posttrial relief must be situated in the context of the contentious discovery disputes which marred this litigation, and in which Merrill Lynch repeatedly and over a considerable period before, right up to and during the trial failed to meet its discovery obligations despite multiple and focused discovery requests of the plaintiffs.

Merrill Lynch produced a limited, initial set of documents in March, 2001, in response to two subpoenas duces tecum from the plaintiffs.[33] However, Merrill Lynch then refused to answer the plaintiffs' interrogatories and document requests for the six months from October, 2001, until a motion to compel was allowed in March, 2002, first arguing that it was not

---

33. At the time of this initial document production, which Merrill Lynch's counsel later stated in an affidavit "was handled by a paralegal employed by Merrill Lynch," Merrill Lynch was not yet named as a defendant in the case. Merrill Lynch was initially a reach and apply defendant and a trustee process defendant in two of the consolidated actions. The plaintiffs moved to amend their complaint to add Merrill Lynch as a party defendant in September, 2001; the motion was allowed in January, 2002.

subject to interrogatories or document requests because it was not yet a party defendant, and later arguing that it was not subject to such requests because "by the time Merrill Lynch was made a party . . . the deadline for discovery had already clearly passed."[34]

The judge allowed the plaintiffs' motion to compel Merrill Lynch to respond to written discovery in March, 2002.[35] This was not the end of the matter, however. Merrill Lynch's refusal to produce certain other documents, in particular its policy and procedure manuals, led to additional rounds of increasingly specific motions to compel production.[36] Numerous documents

---

34. Merrill Lynch's position was that the plaintiffs should be afforded *no* opportunity to serve Merrill Lynch with interrogatories or document requests because Merrill Lynch was not named as a party until after the expiration of a deadline set by a scheduling order that predated Merrill Lynch's involvement as a party defendant in the case.

35. The judge required that the plaintiffs, if they in fact chose to seek written discovery from Merrill Lynch, submit to any written discovery requests by Merrill Lynch as well.

36. The plaintiffs filed an emergency motion to compel production of, inter alia, Merrill Lynch's policy and procedure manuals, in June, 2002; this motion was allowed in part over Merrill Lynch's opposition. Other parts of the order allowing this motion were modified after an emergency motion for reconsideration by Merrill Lynch was granted in part and denied in part, but Merrill Lynch specifically was required to produce "any such manuals, or portions of manuals, that are

(Cont'd)

responsive to the plaintiffs' requests for Merrill Lynch's records concerning the Benistar account were not produced by Merrill Lynch until much later-in some cases, until the middle of the trial. Meanwhile, Merrill Lynch fought a separate battle on the issue of depositions.[37]

On the eve of trial in late November, 2002, Merrill Lynch produced additional relevant documents concerning its internal review of the Benistar account.[38]

(Cont'd)
responsive to [specifically numbered] requests." In October, 2002, the plaintiffs filed yet another motion to compel Merrill Lynch to produce its policy and procedure manuals for inspection and copying, which Merrill Lynch again opposed on the ground that it already had responded adequately by making available some portions of its manuals. This resulted in yet another order from the judge, less than one month before trial, specifically ordering that the plaintiffs' counsel be permitted to inspect, and copy relevant portions of, two particular manuals.

37. Merrill Lynch allowed the plaintiffs to depose its employee Stern in October, 2001, but fought the plaintiffs' attempts to depose other witnesses whom the plaintiffs learned were involved in Merrill Lynch's supervision of the Benistar account. Merrill Lynch unsuccessfully opposed the plaintiffs' motion to compel depositions from two key employees, Levine and Tabbah; this motion to compel was allowed and the depositions taken in February, 2002. The plaintiffs' motion to compel the deposition of an additional employee, Rasmussen, who proved to be an important witness at trial, was denied.

38. The plaintiffs characterized these documents as "new" computer printouts showing Merrill Lynch's reviews of the
(Cont'd)

Appendix B

On the second day of trial, Merrill Lynch disclosed information about the expected testimony of one of its witnesses, Rasmussen, the Merrill Lynch employee who had made the decision to shut down the Benistar account, and whom the plaintiffs had unsuccessfully attempted to depose in advance of trial. This information led the plaintiffs to suspect that Rasmussen's files, which should have included documents concerning Merrill Lynch's supervision of the Benistar account, had not been produced to the plaintiffs. The plaintiffs therefore moved for the immediate production of those documents, along with those of another witness.

On Sunday, December 1, 2002, at around 8 P.M., after pretrial motions and the first five days of trial, and with testimony set to resume the next morning after a Thanksgiving hiatus, Merrill Lynch transmitted additional documents by facsimile to the plaintiffs. These documents, and more that Merrill Lynch produced the next morning as the trial resumed, included documents related to Merrill Lynch's supervision of the Benistar account that Merrill Lynch admitted it previously had not produced.[39, 40] The plaintiffs argued that these

---

(Cont'd)

Benistar account, naming new individuals at Merrill Lynch not previously known to the plaintiffs who were involved in those reviews. Merrill Lynch argued that these documents previously had been made available to the plaintiffs at a witness deposition. Resolving this dispute would require additional documents that are not part of the record on this appeal.

39. An affidavit of plaintiffs' counsel avers that there were approximately 140 pages of documents not previously produced (Cont'd)

documents, which contained "many new names" the plaintiffs previously had not seen, and some of which concerned Merrill Lynch's internal compliance review of the Benistar account, fell within not only the plaintiffs' discovery requests dating back to 2001, but also multiple motions to compel production that the judge had allowed.

It is undisputed that even after this additional extraordinarily late round of document production, Merrill Lynch at no time produced the documents described below, which became the subject of the plaintiffs' rule 60(b)(2) motion for a new trial.

b. *Mass. R. Civ. P. 60(b)(2).* The purpose of rule 60, which governs posttrial relief, is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure § 2851 (2d ed.1995).

(Cont'd)
by Merrill Lynch. The judge called for an affidavit from Merrill Lynch to explain why the document production was so late.

40. Among the new documents, the plaintiffs found particularly significant a facsimile cover sheet from Benistar to Merrill Lynch stating, "Here's the account selection," which the plaintiffs argued was referring to, and would have enclosed, an account selection form from a Benistar client, in which the client specified its choice of the type of "account" in which Benistar was to hold its funds at Merrill Lynch. Merrill Lynch disputes that there was any account selection "form" associated with this document.

Appendix B

A party seeking postjudgment relief on grounds of "newly discovered evidence" invokes rule 60(b)(2), and must satisfy four requirements: "(1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted." *United States Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir.2002), citing *Mitchell v. United States*, 141 F.3d 8, 18 (1st Cir.1998).[41]

The trial judge "typically has an intimate, first-hand knowledge of the case, and, thus, is best positioned to determine whether the justification proffered in support of a [r]ule 60(b) motion should serve to override the opposing party's rights and the law's institutional interest in finality." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir.2002). "Consequently, we defer broadly to the [judge's] informed discretion in granting or denying relief from judgment, and we review [the] ruling solely for abuse of that discretion." *Id.* This deferential standard is particularly appropriate where, as here, the

---

41. Rule 60(b)(2) of the Massachusetts Rules of Civil Procedure, 365 Mass. 828 (1974), is the same as Fed.R.Civ.P. 60(b)(2). "In construing our rules of civil procedure, we are guided by judicial interpretations of the cognate Federal rule 'absent compelling reasons to the contrary or significant differences in content.' " *Doe v. Senechal*, 431 Mass. 78, 81 n. 8, 725 N.E.2d 225, cert. denied, 531 U.S. 825, 121 S.Ct. 71, 148 L.Ed.2d 35 (2000), quoting *Rollins Envtl. Servs., Inc. v. Superior Court*, 368 Mass. 174, 179-180, 330 N.E.2d 814 (1975).

judge who ruled on the rule 60(b)(2) motion is not only the same judge who presided over the trial, but also the same judge who presided over the discovery phase of the litigation and so was intimately familiar with the parties' discovery conduct.

c. *Newly discovered evidence: Patterson.* The newly discovered evidence submitted by the plaintiffs was twofold: an affidavit and accompanying exhibits submitted by a Massachusetts attorney not affiliated with the litigation and an affidavit submitted by the defendant Paley. The more significant of these was the affidavit and accompanying exhibits provided by attorney David Patterson of Newton. In 1998, Patterson represented an individual who sought to effectuate a § 1031 transaction, and who retained Benistar as the qualified intermediary for the property exchange.[42] According to findings of fact of the judge, between October 21 and 23, 1998, Patterson communicated several times by telephone and in writing with Merrill Lynch's Levine in order, in Patterson's words, to "make sure specifically that Merrill Lynch understood that these were escrow funds, and that [Merrill Lynch had] a general understanding of how this transaction was meant to work."[43] Levine was not a mere passive

---

42. Patterson's client is not a party in these cases. She has asserted no claims against Benistar Trust or the other defendants.

43. In connection with their motion, the plaintiffs submitted Patterson's billing records, which show telephone calls with Levine on October 21 and 22, 1998. The plaintiffs also submitted the written communications between Levine and Patterson, including a facsimile signed by Levine.

recipient of information from Patterson. He actively sought to respond to Patterson's concerns. On October 22, Levine responded to a request from Patterson by transmitting to him some account forms by facsimile. The next day, Patterson sent Levine, both by mail and by facsimile transmission, a copy of the escrow agreement that his client had signed with Benistar regarding the funds to be kept at Merrill Lynch, and a copy of the exchange agreement that his client had signed with Benistar and the seller of the property she was purchasing through the § 1031 transaction, along with a cover letter. The escrow agreement, which is titled "Escrow Agreement" in bold capital letters, explains in some detail that Patterson's client, in order to effectuate a § 1031 property exchange, "will be depositing with Benistar an amount of funds to be deposited in the Benistar accounts at Merrill Lynch," and that these funds are to be held in an "escrow custodial account" at Merrill Lynch for the benefit of Patterson's client. The exchange agreement makes abundantly clear the nature of the § 1031 transaction and Benistar's role as an intermediary.[44]

Years after Patterson's client's transaction was completed, Patterson saw a newspaper article in the Boston Globe about the trial and subsequent proceedings in this case and, with his client's permission,

---

44. Patterson sent these agreements to Levine shortly after Carpenter opened the Benistar account in October, 1998. Stated differently, from almost the beginning, Merrill Lynch's employee Levine had knowledge of the nature of Benistar Trust's business.

contacted the plaintiffs' counsel. In March, 2004, he provided an affidavit attesting to his communications with Levine, along with copies of the written communications and telephone and billing records indicating the relevant telephone calls and corroborating the dates of the facsimiles.

The import of this evidence is readily apparent. Far from being merely cumulative or impeaching, it cuts to the heart of Merrill Lynch's argument in its successful motion for judgment n.o.v. that Merrill Lynch had no "actual knowledge" of the nature of Benistar Trust's business or the nature of its misdeeds. In a May, 2002, pretrial affidavit in support of Merrill Lynch's motion for summary judgment, and again at trial, Levine denied knowing any of these facts about Benistar Trust's business during the relevant period; Levine also pointedly denied having any contact with any of Benistar Trust's clients in Massachusetts.[45] Moreover, Levine

45. In his pretrial affidavit, Levine specifically stated that he "had no communications or other contact with *anyone* in Massachusetts in connection with any of the Benistar accounts" (emphasis added). Counsel for Merrill Lynch repeatedly emphasized this point to the jury. In his opening argument, he stated that "[n]o one ever called Merrill Lynch" and no "documents . . . were ever provided to Merrill Lynch" that would have revealed that "this was third-party money." In his closing argument, he again emphasized that none of the plaintiffs ever had communicated with Merrill Lynch: "All it would have taken was one telephone call to Merrill Lynch by one of these plaintiffs to alert Merrill Lynch to what was going on . . . That call never came." Although Patterson's client was not a plaintiff, the judge found that his telephone call alerted Merrill Lynch in precisely this way to the fact that Benistar was trading with the funds of clients to whom it owed a fiduciary duty.

testified at trial that, if he had been aware that the Benistar Trust account held third-party or client funds, Merrill Lynch would not have permitted Benistar Trust to open corporate accounts or to engage in option trading with the funds. In light of subsequent developments, it would be reasonable for a jury not to credit this testimony.[46] In allowing Merrill Lynch's motion for judgment n.o.v., the judge found that there was "no dispute" that "no one at Merrill Lynch ever saw any of the written agreements" that would have revealed that the funds were being held in escrow for the benefit of the plaintiffs, to whom Benistar Trust owed a fiduciary duty as an intermediary, a conclusion that cannot be sustained in the face of the Patterson evidence.[47]

The Patterson evidence, if believed, shows what Merrill Lynch knew about Benistar Trust's business, its arrangements with its clients, and its misdeeds, allowing a jury to find, in the judge's words, that Merrill Lynch

---

46. See notes 47 and 51, *infra*.

47. After the plaintiffs brought forward the Patterson evidence, Levine averred in an amended affidavit that "it appears that I sent a facsimile in October 1998 to a David Patterson." Levine no longer denied all contact with Patterson. Levine continued to deny receiving from Patterson the escrow and exchange agreements and Patterson's cover letter of October 23, 1998. However, the letter bore Levine's correct facsimile number and address, and the judge found that Patterson in fact sent both the cover letter and the escrow and exchange agreements to Levine.

"knew one or more of the other defendants was or were breaching fiduciary duties owed to clients, converting client funds, or both." The judge found the Patterson evidence credible and persuasive. In light of that, she made specific findings that Merrill Lynch was in direct communication with the Massachusetts representative of at least one Benistar client, and that in the course of this communication, that representative (Patterson) sent Merrill Lynch multiple copies of the legal agreements specifying Benistar's role as an intermediary holding third-party funds in escrow in its account at Merrill Lynch. In addition, the judge found that, notwithstanding Levine's amended affidavit testimony to the contrary, see note 47, *supra,* in fact Patterson did explain to Levine, in a telephone conversation, both the nature of a § 1031 exchange and the fact that Patterson's client's funds would be held in escrow at Merrill Lynch in the Benistar account. She concluded that such evidence satisfied the requirements of rule 60(b)(2). It "is not merely cumulative or impeaching" and "is of such a nature that it would probably change the result were a new trial to be granted," satisfying the third and fourth requirements of the rule. *United States Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir.2002).

We reject Merrill Lynch's contention that the Patterson evidence was not, in fact, "discovered since the trial" or, in the alternative, that it could "by due diligence have been discovered earlier by the movant." *Id.* The basis for both of these claims is the undisputed fact that the cover letter from Patterson to Levine was

in the plaintiffs' possession before trial. It was not Merrill Lynch that produced this document, or any other record of Levine's communications with Patterson. A copy of the cover letter sent by Patterson to Levine was produced by Paley in response to the plaintiffs' pretrial document request.[48] In any event, as the judge noted, the cover letter, by itself, would not establish "actual knowledge" on the part of Merrill Lynch.[49] It is Patterson's affidavit, which details his oral and written communications with Merrill Lynch, that gives the document Paley produced in discovery its meaning and force. It is undisputed that the Patterson affidavit itself, along with the escrow agreement, the § 1031 property exchange agreement, and the records of telephone conversations and facsimiles that together comprise the Patterson evidence, have all been discovered "since the trial." Merrill Lynch's sweeping statement that "the 'newly' discovered Patterson documents had been

---

48. The cover letter was addressed to Levine, but a notation on the letter indicates that copies without enclosures were also to be sent to Carpenter and Paley. To date, only the Paley copy of the cover letter, along with an accompanying facsimile cover sheet addressed to Paley, has been produced by any of the defendants. The judge noted that Paley produced this document "as part of a supplemental response to plaintiffs' repeated document requests and motions to compel production of documents."

49. The judge also noted that, by itself, the cover letter would not be admissible in evidence against Merrill Lynch.

produced to and were in possession of plaintiffs' counsel" before trial is far from accurate.[50]

We also agree with the judge that the plaintiffs met their burden of showing that the Patterson evidence could not by due diligence have been discovered earlier by the movant. Parties to litigation are required to exercise due diligence in the search for relevant information, but the degree of diligence required to satisfy the strictures of rule 60(b)(2) is not unlimited. See *Kettenbach v. Demoulas,* 901 F.Supp. 486, 495 (D.Mass.1995) ("failure to pursue discovery to the utmost limit does not preclude a successful Rule 60[b][2] motion"), citing *Krock v. Electric Motor & Repair Co.,* 339 F.2d 73, 74-75 (1st Cir.), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964) (failing to make full use of discovery does not require finding of lack of due diligence).

This is not a case where the movant under rule 60(b)(2) failed to make the discovery requests of the nonmoving party that would have yielded the evidence before trial. See, e.g., *Zurich N. Am. v. Matrix Serv., Inc.,* 426 F.3d 1281, 1290 (10th Cir.2005) (documents not newly discovered when plaintiff knew documentation

---

50. It should be noted that, even in cases where the "newly discovered" evidence *was* actually in the plaintiffs' possession before trial—which was not the case here—a judge may nevertheless properly exercise her discretion to allow a motion for posttrial relief under rule 60(b)(2). See *United States Steel v. M. DeMatteo Constr. Co.,* 315 F.3d 43, 52 (1st Cir.2002); *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525 (8th Cir.1996).

was missing "almost a year prior to the start of trial," made "no attempt to explicitly include it" in the discovery process, and abandoned its requests for the documents for over one year). This is not a case where the movant failed to exercise due diligence by failing to call an important witness of whom the moving party was aware before trial, see *Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir.1988) ("the appellant himself admits that he was aware, before trial, of the policeman's identity and knowledge concerning the accident"); or making a strategic choice not to pursue the evidence, see *Knott v. Racicot*, 442 Mass. 314, 325, 812 N.E.2d 1207 (2004), or failing to exercise "even minimal diligence." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir.2002) (moving party "fails to explain why this evidence could not have been found, well before the entry of judgment, in the exercise of even minimal diligence"). Here the plaintiffs' repeated efforts at increasingly tailored discovery were impeded at nearly every turn by Merrill Lynch.

It is unnecessary to decide whether Merrill Lynch deliberately withheld or destroyed the key documents that it did not produce. However, as the judge found, "it is at least fair to say that Merrill Lynch *should* have had these documents in its files, which would have led to their production"[51] (emphasis in original). The

51. The judge found that "one might well expect that Merrill Lynch itself would have a copy of the Patterson letter and its attachments. However, despite testimony from Levine that his brokerage group filed and retained all correspondence (Cont'd)

plaintiffs made pretrial document requests that squarely covered the documents. A party "treads on thin ice when he argues that [the plaintiffs] could have uncovered [the evidence] had [the] [p]laintiffs been more persistent in pursuing depositions and document discovery when several [court] orders . . . were necessary to compel discovery to move forward." *Kettenbach v. Demoulas*, 901 F.Supp. 486, 495 (D.Mass.1995). It would reward obstruction of the orderly process of litigation effectively to penalize the plaintiffs for failing to discover what Merrill Lynch, for whatever reason, failed to produce in a timely manner, or failed to produce at all. The conduct of the nonmoving party is relevant to the question whether the moving party in a rule 60(b)(2) motion exercised due diligence. See, e.g., *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1536 (8th Cir.1996); *Kettenbach v. Demoulas, supra* (rule 60[b][2] motion allowed as to newly discovered tape recording containing an incriminating conversation with person who was apparently coconspirator with defendant where

---

(Cont'd)

relating to their clients and that they retained all Benistar-related correspondence and documents, and despite pretrial document requests of the plaintiffs to Merrill Lynch that squarely covered this type of correspondence, Merrill Lynch never produced a copy of the Patterson correspondence from its files before, during, or after the jury trial." These facts alone do not conclusively prove that Merrill Lynch either intentionally destroyed or refused to produce documents in its possession, and the judge thus did not abuse her discretion in denying the plaintiffs' motion under Mass. R. Civ. P. 60(b)(3), 365 Mass. 828 (1974).

plaintiff's failure to depose coconspirator, whose identity was unknown before trial but might have been discovered, was due in part to defendant's own discovery abuses). We conclude that the judge, who was, as we noted earlier, intimately familiar with both the plaintiffs' attempts to obtain discovery and Merrill Lynch's resistance to that discovery, did not abuse her discretion in finding no lack of due diligence on the part of the plaintiffs.

d. *Newly discovered evidence: Paley.* The plaintiffs also offered as newly discovered evidence a separate affidavit from Paley. At trial, Paley invoked his Fifth Amendment privilege against self-incrimination and refused to answer any questions. See note 13, *supra.* In his posttrial affidavit, Paley averred that in October, 1998, he had at least one very specific conversation with Levine in which he explained Benistar Trust's business as an intermediary for § 1031 transactions, and explained that the funds in the Benistar Trust account at Merrill Lynch were third-party client funds. The judge found that the Paley evidence, if credible, would support the conclusion that Merrill Lynch had "actual knowledge" that the Benistar Trust account contained funds held in escrow for third-party clients, and provided "substantial assistance" to Benistar in misusing those funds. On the other hand, she also concluded that Paley's credibility was "extremely questionable" because his sworn statement was given in return for the plaintiffs' agreement to release Paley from damages "well in excess of $16 million." Because the Patterson evidence alone was sufficient to warrant allowing the plaintiffs' motion

for posttrial relief under rule 60(b)(2), we need not reach the question whether the Paley evidence alone would justify a new trial.[52] The plaintiffs are free to attempt to introduce the Paley evidence at the new trial.

The plaintiffs argue that, rather than granting a new trial, the court should allow their motion to reinstate the jury verdict. We are mindful of the burden on all parties that a new trial represents. But the judge was correct in concluding that the plaintiffs' preferred remedy would be inappropriate here. Even after the introduction of the newly discovered evidence, disputed issues of material fact remain; the credibility of the witnesses and documentary evidence must be weighed by the fact finder. As the plaintiffs would not be entitled to summary judgment, they are not entitled to reinstate the jury verdict.

5. *Remaining claims.* The judge denied the motion of Carpenter, Molly Carpenter, and Benistar Ltd. to dismiss the claims against them for lack of personal jurisdiction. The Benistar defendants argue on appeal that the judge lacked personal jurisdiction over any of the Benistar defendants with the exception of Benistar Trust. We have carefully considered their arguments in light of the evidence on the question. For essentially the reasons articulated by the judge and by the Appeals

52. We thus express no opinion here on the proper treatment under rule 60(b)(2) of "newly discovered" evidence that was obtained in exchange for a release from civil liability for a witness who had invoked his Fifth Amendment privilege at trial.

Court, we affirm. See *Cahaly v. Benistar Prop. Exch. Trust Co.*, 68 Mass.App.Ct. 668, 676-677, 864 N.E.2d 548 (2007). The Benistar defendants also appeal from the judge's denial of their motion for a new trial. Again, after careful consideration of the arguments, and for essentially the reasons articulated by the judge and by the Appeals Court, we affirm. See *id.* at 677-678, 864 N.E.2d 548. After careful consideration we likewise reject the remaining contentions of the Benistar defendants for essentially the reasons offered by the trial judge and the Appeals Court. See *id.* at 678-81, 864 N.E.2d 548.

6. *Conclusion.* For the reasons set forth above, we affirm the denial of the Benistar defendants' motion for a new trial and the entry of judgment against the Benistar defendants. We affirm the decision to grant judgment n.o.v. to Merrill Lynch. We affirm the decision granting the plaintiffs a new trial of their claims against Merrill Lynch. We remand the consolidated cases to the Superior Court for further proceedings consistent with this opinion.

So ordered.

APPENDIX C — OPINION OF THE APPEALS COURT OF MASSACHUSETTS, SUFFOLK DATED APRIL 17, 2007

APPEALS COURT OF MASSACHUSETTS, SUFFOLK

No. 05-P-1717

Suffolk. November 1, 2006. April 17, 2007.

GAIL A. CAHALY & others[1]

vs.

BENISTAR PROPERTY EXCHANGE TRUST CO., INC., & others.[2]

Present: KANTROWITZ, COWEN & GRAINGER, JJ

---

1. Jeffrey M. Johnston; Bellemore Associates, LLC; Massachusetts Lumber Company, Inc.; Joseph Iantosca, individually and as trustee of the Faxon Heights Apartments Realty Trust and Fern Realty Trust; Belridge Corporation.

2. Benistar Ltd.; Benistar Employer Services Trust Corporation; Benistar Admin. Services, Inc.; Carpenter Financial Group, LLC; Molly Carpenter; Daniel E. Carpenter; Merrill Lynch, Pierce, Fenner & Smith, Inc.; UBS PaineWebber, Inc.; and U.S. Property Exchange.

Appendix C

Practice, Civil, Relief from judgment, Judicial discretion, New trial, Judgment notwithstanding verdict. *Judgment*, Relief from judgment. *Jurisdiction*, Personal, To reach and apply assets. *Conversion. Fiduciary. Fraud. Joint Tortfeasors.*

GRAINGER, J. This matter, involving protracted multiparty litigation, is presented in part by an amended report pursuant to Mass.R.Civ.P. 64(a), as amended, 423 Mass. 1403 (1996), and in part by cross appeals from an amended final judgment pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974).

The following facts are uncontested: the plaintiffs were investors who each separately contracted with defendant Benistar Property Exchange Trust Company, Inc. (Benistar), for the purpose of deferring tax obligations on proceeds from the sale of their investment properties. They did so pursuant to 26 U.S.C. § 1031 whereby a property owner may avoid recognition of gains from the property's sale by engaging in a "like-kind" property exchange within 180 days. See 26 U.S.C. § 1031(a)(3) (2000). This tax advantage required the plaintiffs to transfer their sale proceeds to an escrow account, qualified trust, or qualified intermediary pending their purchase of replacement property. The plaintiffs here arranged for the proceeds from their respective property sales to be sent to Benistar, which advertised itself as a qualified intermediary under § 1031.

Benistar thus came to be in possession of the plaintiffs' funds, subject to written agreements titled, variously, "Exchange Agreement," "Exchange Fee Agreement," "Escrow Agreement," or "Account Selection Form" (the agreements). The agreements expressly provided that the plaintiffs' funds were to be invested in either a three-percent (per annum) "money market" account or a six-percent (per annum) "investment" account. The agreements also required Benistar to deliver the escrowed funds to the sellers of the replacement properties, or to the plaintiffs themselves, upon the plaintiffs' instructions. While in possession of the plaintiffs' funds, Benistar engaged in high-risk options trading, eventually losing approximately nine million dollars of the plaintiffs' funds.

During the time of Benistar's trading, the funds were first held in brokerage accounts at Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), and subsequently transferred to similar accounts at UBS PaineWebber, Inc. (PaineWebber). Additional facts are discussed below as they arise in the context of relevant claims.

Procedural history. Starting in January, 2001, the plaintiffs filed actions (later consolidated) against Benistar, various Benistar affiliates,[3] Merrill Lynch, PaineWebber, Molly and Daniel Carpenter (officer and owner of Benistar, respectively), and Martin Paley

3. Benistar Admin. Services, Inc.; Benistar Employer Services Trust Corporation; Benistar Ltd.; Carpenter Financial Group, LLC; and U.S. Property Exchange.

(Benistar's president), asserting claims of breach of contract, conversion, breach of fiduciary duty, fraud, misrepresentation, and violation of G.L. c. 93A. In addition, the plaintiffs' claims against Merrill Lynch and PaineWebber included aiding and abetting the conversion and breach of fiduciary duty committed by Benistar, violation of the Connecticut Unfair Trade Practices Act, and violation of the New York Consumer Protection Act.

In March, 2002, the trial judge[4] granted summary judgment to the plaintiffs on their claims of conversion and breach of contract against Benistar arising out of the misuse and eventual loss of their funds. She allowed the remaining common-law claims and consumer protection claims to proceed to trial. In July, 2002, the judge granted summary judgment for PaineWebber on the plaintiffs' aiding and abetting claims, arising out of PaineWebber's relatively brief (three-month) role as investment broker for Benistar's speculations after Merrill Lynch terminated the Benistar account. In December, 2002, a jury found Benistar, its principals, and Merrill Lynch liable on all of the plaintiffs' common-law and Connecticut and New York consumer protection claims.

In February, 2003, the judge allowed Merrill Lynch's motion for judgment notwithstanding the verdict (judgment n.o.v.). The judge found scant evidence that

---

4. This case benefited from docketing in the Superior Court business litigation session; consequently, virtually all motions were able to be heard and decided by the trial judge.

Merrill Lynch had actual knowledge that Benistar was using funds belonging to third parties, and no evidence that Merrill Lynch had actual knowledge that any restrictions attached to those funds.[5]

The plaintiffs' claims under G.L. c. 93A were tried to the judge in March, 2003. On these claims, she found Benistar, Daniel Carpenter, and Paley liable and awarded double damages; the judge found Molly Carpenter not liable.

In February, 2004, and just within the one-year time period prescribed by Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), the plaintiffs moved for reinstatement of the jury verdict against Merrill Lynch on the basis of newly discovered evidence, discussed in detail below. Benistar, several corporate affiliates, and the Carpenters filed a motion for new trial in May of the same year. The judge held evidentiary hearings on those motions and, in August, 2004, denied the plaintiffs' motion to reinstate the verdict, instead granting the plaintiffs a new trial against Merrill Lynch based on the newly discovered evidence. See Mass.R.Civ.P. 60(b)(2). At the same time the judge denied the Benistar motion for a new trial.

An amended rule 64(a) report issued in November, 2004, asking this court to review the trial court's grant of judgment n.o.v. to Merrill Lynch as well as the grant

---

5. She also found insufficient evidence that Merrill Lynch provided substantial assistance in the conversion or breach of fiduciary duty.

of a new trial against Merrill Lynch to the plaintiffs. On the same day, an amended partial and final judgment under rule 54(b) was entered on the plaintiffs' claims against the Carpenters, Benistar, certain Benistar corporate affiliates,[6] Paley,[7] and U.S. Property Exchange.[8] The judgment also dismissed all of the plaintiffs' claims against PaineWebber. The plaintiffs have appealed from the judgment, and the Carpenters, Benistar, and the corporate affiliates have cross-appealed.

Discussion. We agree that the posture of this case recommends a rule 64(a) report of the judge's decisions

6. Benistar Ltd.; Benistar Employer Services Trust Corporation; Benistar Admin. Services, Inc.; and Carpenter Financial Group, LLC. As to these defendants, the judge determined in September of 2003 after a jury-waived trial that disregard of the corporate form was appropriate and that they should share in the liability of Benistar and the Carpenters. See part 1, *infra*.

7. Although the jury had returned verdicts for the plaintiffs against Paley and the judge had found against him under G.L. c. 93A, the final judgment was in Paley's favor due to a stipulation of dismissal entered after his posttrial agreement to waive his testimonial privilege and provide evidence for the plaintiffs' use in their motion to reinstate the verdict against Merrill Lynch. See note 10, *infra*, and accompanying text. (Paley has not participated in the appeal.)

8. U.S. Property Exchange was found liable as the corporate successor to Benistar and has not participated in the appeal.

to grant judgment n.o.v. to Merrill Lynch and to grant the plaintiffs a new trial, so that these can be considered at the same time as the final judgment entered under rule 54(b), avoiding piecemeal appellate review.[9] We turn first to the grant of a new trial against Merrill Lynch and then discuss, in turn, Benistar's appeal and that of the plaintiffs involving PaineWebber. We conclude by affirming in all respects.

The grant of a new trial with respect to claims against Merrill Lynch. We review a judge's decision on a motion for relief from judgment under rule 60(b) for a "clear abuse of discretion." *Tai v. Boston,* 45 Mass.App.Ct. 220, 224, 696 N.E.2d 958 (1998), quoting from *Scannell v. Ed. Ferreirinha & Irmao, Lda.,* 401 Mass. 155, 158, 514 N.E.2d 1325 (1987). Here, the judge found that the material presented by the plaintiffs as newly discovered evidence under rule 60(b)(2) supported their claim that Merrill Lynch had possessed actual knowledge that Benistar was investing client funds subject to restrictions, and had provided substantial assistance to the Benistar defendants in their misconduct.

---

9. "If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the Appeals Court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties." Mass.R.Civ.P. 64, as amended, 423 Mass. 1403 (1996). See *Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 261 n. 4, 612 N.E.2d 1158 (1993), and cases cited.

The judge based her rule 60(b)(2) analysis on two sources of evidence presented by the plaintiffs. One source, defendant Martin Paley, had asserted his privilege under the Fifth Amendment to the United States Constitution at trial, but waived that privilege in February, 2004, when he provided an affidavit to the plaintiffs.[10] In that affidavit, Paley, president of Benistar, recounted a conversation with Gerald Levine, a broker at Merrill Lynch, in which Paley stated that the money in Benistar accounts was client funds held in escrow, and that those funds were required to be made available to clients upon request within forty-eight hours.

Merrill Lynch argues that the judge abused her discretion because posttrial affidavits of codefendants who exercised their Fifth Amendment privilege in a criminal trial are not considered newly discovered evidence in many circuits of the United States Court of Appeals. See cases cited in *United States v. Montilla-*

---

10. The plaintiffs entered into a posttrial settlement agreement with Paley in which they promised to dismiss their claims against him if he waived his Fifth Amendment privilege and testified, and if the plaintiffs' motion to reinstate the jury verdict was granted. (See note 7, *supra.*) Paley's liability, jointly and severally with other defendants, otherwise would have stood around sixteen million dollars. Merrill Lynch asserts that the affidavit represents no more than testimony purchased by the plaintiffs, and should therefore be excluded on public policy grounds. However, portions of Paley's posttrial affidavit are distinctly unhelpful to the plaintiffs, undermining this contention. Paley and the plaintiffs were clearly adversarial parties at trial. As the trial judge has noted, Paley's credibility is properly a matter for the jury to consider.

Rivera, 115 F.3d 1060, 1065-1066 (1st Cir.1997). Our courts have favored instead a case-by-case analysis. See, e.g., *Commonwealth v. Wolinski*, 431 Mass. 228, 237-238, 726 N.E.2d 930 (2000); *Commonwealth v. Cintron*, 435 Mass. 509, 516-518, 759 N.E.2d 700 (2001). This approach has also been taken by the First Circuit. See *United States v. Montilla-Rivera*, *supra* at 1066.[11]

We reject Merrill Lynch's contention that because the trial judge strongly expressed her doubt about the credibility of the Paley evidence, it cannot support the allowance of a new trial. Case law in this Commonwealth acknowledges that posttrial evidence of a witness who did not testify is "the weakest sort of evidence," but the analysis does not end there. See *Commonwealth v. Evans*, 439 Mass. 184, 203-204, 786 N.E.2d 375, cert. denied, 540 U.S. 923, 124 S.Ct. 323, 157 L.Ed.2d 222 and 540 U.S. 973, 124 S.Ct. 445, 157 L.Ed.2d 322 (2003),

---

11. We likewise disagree with Merrill Lynch's contention that the plaintiffs failed to prove that Paley's testimony was unavailable because they did not request "a judicial ruling on the propriety of Paley's invocation of the Fifth Amendment." Merrill Lynch offers neither support for the assertion that such a ruling is required nor any basis on which Paley's invocation of the Fifth Amendment privilege might have been adjudged inappropriate. In other areas of our case law, we similarly recognize a distinction between the posttrial admissibility of evidence presented by defendants who previously exercised their Fifth Amendment privilege during trial (thereby controlling their own "unavailability") and that presented by other parties. Compare *Commonwealth v. Ortiz*, 393 Mass. 523, 529-530, 471 N.E.2d 1321 (1984), with *Commonwealth v. Labelle*, 67 Mass.App.Ct. 698, 701, 856 N.E.2d 876 (2006).

citing *Dirring v. United States*, 353 F.2d 519, 520 (1st Cir.1965). Although the trial judge opined that the Paley evidence has "substantial credibility issues," she also found that the evidence nevertheless supports a rule 60(b)(2) motion because it is material, likely to affect the outcome if believed, and admissible. The trial judge was well within her discretion in finding that a jury may consider the evidence, weigh its value, and determine the witness's credibility. We uphold the trial judge's determination that, as to the plaintiffs, Paley's testimony was newly discovered under the requirements of rule 60(b)(2).

The second source of evidence considered by the judge in her decision to grant a new trial was an affidavit from attorney David Patterson, who represented a Benistar client not party to the suit. Patterson's affidavit described oral and written communications with one of Benistar's primary brokers at Merrill Lynch during 1998 in which Patterson had explained the nature and limitations of the Benistar-client relationship. Patterson's affidavit specifically described a cover letter that he had mailed and faxed to the Merrill Lynch broker, to which Patterson had attached copies of Benistar-client agreements. Merrill Lynch argued that the Patterson evidence could not support the grant of a new trial because a copy of Patterson's cover letter, albeit without the enclosed agreements, had been produced to the plaintiffs during pretrial discovery.[12]

12. In keeping with the tangled nature of the web woven below, this letter was never produced by Merrill Lynch, to whom (Cont'd)

Appendix C

In considering the exercise of due diligence required by the language of rule 60(b)(2), the judge specifically noted that the plaintiffs sent pretrial document requests to the defendants—including, notably, Merrill Lynch—"that squarely covered this type of correspondence." See *Kettenbach v. Demoulas*, 901 F.Supp. 486, 495 (D.Mass.1995) ("failure to pursue discovery to the utmost limit does not preclude a successful Rule 60[b][2] motion"), citing *Krock v. Electric Motor & Repair Co.*, 339 F.2d 73, 74-75 (1st Cir.) (failing to make full use of discovery does not require a finding of lack of due diligence), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964).

We conclude that the pretrial failure of plaintiffs' counsel to follow the clear signposts provided by the Patterson letter materially detracts from what would otherwise be a textbook example of evidence—found by the judge to be "specific," "credible," and corroborated by other contemporaneous evidence—entitling the applicant to a new trial. Pretrial possession of the Patterson letter, simply stated, means that the evidence to which it leads could have been obtained under the "due diligence" strictures of rule 60(b)(2), and cannot therefore now be considered "newly discovered" within the meaning of the rule.

(Cont'd)

it had been addressed and sent, and from whom production could properly have been expected. Instead it was produced by the defendant Paley—the very party whose credibility is now attacked by Merrill Lynch on appeal.

However, the judge properly exercised her discretion in concluding that the Paley evidence was sufficient, standing alone, to support the grant of a new trial. The Paley evidence is material to the issue of Merrill Lynch's actual contemporaneous knowledge of Benistar's wrongdoing. It very likely would have produced a different result, since the judge could not properly have granted a judgment n.o.v. if Paley had testified.[13] See *Wojcicki v. Caragher*, 447 Mass. 200, 215, 849 N.E.2d 1258 (2006) (new evidence must be material in sense that it would likely affect result). We therefore affirm the judge's order granting a new trial on the claims against Merrill Lynch.

Appeal of the Benistar defendants.[14]

1. *The challenge to personal jurisdiction.* In general, personal jurisdiction is properly exercised over any defendant in connection with the transacting of any business in the Commonwealth (directly or through an agent) or over a defendant who causes "tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business,

---

13. Other than that which was introduced posttrial, the record contains no evidence that Merrill Lynch had actual knowledge of any restrictions imposed on Benistar's use of the plaintiffs' funds. Accordingly, we conclude that the judge was correct in granting judgment n.o.v. in favor of Merrill Lynch.

14. The "Benistar defendants" are Benistar; Daniel and Molly Carpenter; Benistar Ltd.; Benistar Admin. Services, Inc.; Benistar Employer Services Trust Corporation; and Carpenter Financial Group, LLC.

or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." G.L. c. 223A, § 3(*a*), (*d*), as amended by St.1969, c. 623.

It does not avail the individual defendants Molly and Daniel Carpenter to assert that "jurisdiction over a corporation does not automatically secure jurisdiction over its officers," *Kleinerman v. Morse,* 26 Mass.App.Ct. 819, 824, 533 N.E.2d 221 (1989), and that Massachusetts "adheres to the general rule that jurisdiction over an officer cannot be based solely on jurisdiction over the corporation, [and] it must be based on acts of the officer themselves, rather than simply the corporation, within the forum state." *Nahigian v. Leonard,* 233 F.Supp.2d 151, 157 n. 1 (D.Mass.2002). The record supports the judge's findings of significant contacts and substantial activities in Massachusetts by both Carpenters, including activities related to the claims asserted by the plaintiffs, see G.L. c. 223A, § 3(*a*), (*d*), and the arguments to the contrary are without merit. The Carpenters' activities in Massachusetts were sufficient to establish minimum contacts such that "traditional notions of fair play and substantial justice" were not offended. See *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945), quoting from *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

We likewise discern no error in the judge's thorough analysis of personal jurisdiction over the Benistar

corporate defendants. The plaintiffs' theory of personal jurisdiction was necessarily intertwined with the merits of their claim that corporate disregard was appropriate in this case. The judge considered and discussed the factors relevant to determining whether corporate formalities may be set aside. See *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 233 N.E.2d 748 (1968); *Evans v. Multicon Constr. Corp.*, 30 Mass.App.Ct. 728, 733, 574 N.E.2d 395 (1991).[15] With ample evidence to support her decision, she rightly concluded that corporate disregard was proper.

Put simply, the actions of the corporations consisted of the actions of the Carpenters and of Benistar. Because piercing the corporate veil was appropriate in this case,[16] and because the actors beneath the veil had

---

15. Specifically, she found that the corporations were commonly owned by the Carpenters, who had pervasive control over all of their activities; that the business activities, assets, and management of the organizations were intermingled; that the corporations were inadequately capitalized; that corporate formalities were not observed; that no corporate records existed; that no dividends were paid; that Benistar was insolvent; that no officers or directors of any of these corporations existed apart from the Carpenters; that Benistar's funds were used by Daniel Carpenter to carry out "his personal penchant for risky option trading on the stock market"; and that the corporations were used to promote fraud. We note that Benistar did not challenge the exercise of personal jurisdiction over it.

16. The judge correctly applied Massachusetts law to the veil-piercing claims. The various Benistar affiliates (all

(Cont'd)

ample minimum contacts with the forum State, we affirm the trial judge's findings that the plaintiffs proved the jurisdictional requirements were met as to all the Benistar corporate defendants.

2. *Benistar motions for a new trial.* The Benistar defendants complain that shortly after the jurors were discharged, two jurors invited plaintiffs' counsel out for "some beers." Counsel firmly, and appropriately, declined the invitations. Even if the jurors' actions were inappropriate, they did not amount to an indication that the verdict was the product of bias or prejudice. The judge rejected the request of the Benistar defendants for an evidentiary hearing or new trial based on the alleged misconduct. There was no error or abuse of discretion. No evidence was submitted that jury misconduct, as our case law explains that term, took place. See *Commonwealth v. Royster*, 15 Mass.App.Ct. 970, 970-971, 446 N.E.2d 1078 (1983).

The Benistar defendants also argue that the judge erred in denying them a new trial based on the newly

---

(Cont'd)

Delaware corporations) assert correctly that the law of the State of incorporation is generally applied to internal corporate affairs. See *Harrison v. NetCentric Corp.*, 433 Mass. 465, 471, 744 N.E.2d 622 (2001); *Clemmer v. Cullinane*, 62 Mass.App.Ct. 904, 905, 815 N.E.2d 651 (2004). However, this case involves not questions of internal governance, but rather the effect of corporate actions in Massachusetts and on Massachusetts citizens. See *Evans v. Multicon Constr. Corp.*, 30 Mass.App.Ct. at 737 n. 7, 574 N.E.2d 395.

discovered Paley evidence. Again, we review a grant or denial of a motion for new trial under rule 60(b) for abuse of discretion. See *Wojcicki v. Caragher*, 447 Mass. at 209, 849 N.E.2d 1258; *Tai v. Boston*, 45 Mass.App.Ct. at 224, 696 N.E.2d 958.

In contrast to the case against Merrill Lynch, the proffered newly discovered evidence does not satisfy the requirement that it will likely affect the outcome of a trial against the Benistar defendants. See Mass.R.Civ.P. 60(b)(2); *DeLuca v. Boston Elev. Ry.*, 312 Mass. 495, 497, 45 N.E.2d 463 (1942); *Wojcicki v. Caragher, supra* at 215, 849 N.E.2d 1258. The overwhelming evidence in favor of the plaintiffs leaves this element of rule 60(b)(2) unmet. We affirm the judge's order denying a new trial for the Benistar defendants.

3. *Assignment of cause of action to plaintiffs.* Benistar complains that the judge was without authority, after entering judgment for the plaintiffs, to reach and apply any cause of action Benistar has against PaineWebber to the plaintiffs. We disagree. General Laws c. 223, § 86A, as amended through St.2000, c. 159, § 278, provides for precisely such relief "[u]pon motion of the plaintiff at any time after entry of a judgment in his favor in the . . . superior court . . . but before the expiration of the time to appeal therefrom or, if an appeal is claimed, during the pendency thereof."[17]

17. Section 86A further specifies that the court shall have jurisdiction "to cause to be reached, held, and thereafter applied . . . the same kind of property, right, title or interest, legal or (Cont'd)

A cause of action is a "valuable interest vested in [the defendant] which can be reached and applied in a creditor's suit." *Digney v. Blanchard*, 229 Mass. 235, 239, 118 N.E. 250 (1918). Nor did the judge abuse her discretion by providing safeguards, such as giving the plaintiffs control over the prosecution of the cause of action, to protect the value of the claim. Authority relied upon by the Benistar defendants is not to the contrary, merely prohibiting execution on security prior to a final judgment. See *Alper v. MacPherson*, 318 Mass. 433, 435, 61 N.E.2d 842 (1945). See also G.L. c. 231, § 115. Where equitable relief is appropriate, its scope is left to the discretion of the trial judge. See *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass.App.Ct. 306, 323, 791 N.E.2d 903 (2003), citing *Commonwealth v. Adams*, 416 Mass. 558, 566, 624 N.E.2d 102 (1993).

4. *Benistar defendants' remaining contentions.* The Benistar defendants make a number of other arguments on appeal in support of vacating the judgment against them. Specifically, they argue that summary judgment was erroneously granted to the

---

(Cont'd)

equitable," as may be reached and applied under G.L. c. 214, § 3(6) and (7). These include "any right, title or interest, legal or equitable, of a debtor, within or without the commonwealth, which cannot be reached to be attached or taken on execution although the property sought to be reached and applied is in the possession or control of the debtor independently of any other person or cannot be reached and applied until a future time or is of uncertain value." G.L. c. 214, § 3(6), inserted by St.1973, c. 1114, § 62.

plaintiffs on their claims of conversion. In addition, the Benistar defendants argue that insufficient evidence existed to support a jury finding of a fiduciary relationship between Benistar and its clients, or to support a finding of fraud.

a. *Conversion.* Conversion consists of a wrongful exercise of dominion or control over the personal property of another. See *Third Natl. Bank of Hampden County v. Continental Ins. Co.*, 388 Mass. 240, 244, 446 N.E.2d 380 (1983). See also *Spooner v. Manchester*, 133 Mass. 270, 274 (1882). On an appeal from a grant of summary judgment, we review the evidence in the light most favorable to the nonmoving party to determine whether all material facts have been established and whether the plaintiffs were entitled to a judgment as a matter of law. See *Nelson v. Salem State College*, 446 Mass. 525, 530, 845 N.E.2d 338 (2006). The record fully supports the judge's conclusions. The Benistar-client agreements transferred the plaintiffs' control over their sale proceeds to Benistar, with a time limit on that control and restrictions on the use of those funds during the time of Benistar's possession. Benistar not only exceeded its authorization but also seriously violated the right of the plaintiffs to control their property. The unauthorized use in this case was sufficiently serious to amount to conversion. See *McGonigle v. Victor H.J. Belleisle Co.*, 186 Mass. 310, 312-313, 71 N.E. 569 (1904); Prosser & Keeton, Torts § 15, at 94 (5th ed.1984).[18]

---

18. Factors to be considered in determining the seriousness of the interference include the extent and duration of the (Cont'd)

See also Restatement (Second) of Torts §§ 227, 228 (1965). In addition, Benistar's failure to remain within the restrictions that defined its authorized use resulted in its inability to comply with the plaintiffs' rightful demand for the return of their funds. See *Abington Natl. Bank v. Ashwood Homes, Inc.*, 19 Mass.App.Ct. 503, 506-507, 475 N.E.2d 1230 (1985), citing *Atlantic Fin. Corp. v. Galvam*, 311 Mass. 49, 50-51, 39 N.E.2d 951 (1942). The proffered evidence established all elements of the plaintiffs' conversion claims and removed any genuine dispute. The grant of summary judgment to the plaintiffs on their conversion claims was proper.

b. *Breach of fiduciary duty.* We will not disturb the jury finding of breach of fiduciary duty unless there was insufficient evidence presented to the jury to support the finding that a relation of trust and confidence existed. See *Yousif v. Yousif*, 61 Mass.App.Ct. 686, 696, 814 N.E.2d 14 (2004), citing *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass.App.Ct. 412, 444, 402 N.E.2d 76 (1980). Where a plaintiff reposes trust and confidence in the defendant, and the defendant knows of the plaintiff's reliance on him, a fiduciary duty may be created. See *Broomfield v. Kosow*, 349 Mass. 749, 754-

---

(Cont'd)

defendant's exercise of control; his intent to assert a right which is in fact inconsistent with the plaintiff's right of control; the defendant's good faith or bad intention; the extent and duration of the resulting interference with the plaintiff's right of control; the harm done to the chattel; and the expense and inconvenience caused to the plaintiff. See Restatement (Second) of Torts § 222A(2) (1965).

758, 212 N.E.2d 556 (1965). Compare *Patsos v. First Albany Corp.*, 433 Mass. 323, 334-336, 741 N.E.2d 841 (2001) (setting out factors relevant to determining whether a fiduciary duty exists in context of client and broker). The jury heard evidence that Benistar promised to hold client funds in escrow, to safeguard those funds, and to provide the expertise the clients themselves lacked to navigate the process that 26 U.S.C. § 1031 requires. The evidence was sufficient to support a finding of breach of fiduciary duty.[19]

c. *False representations.* Finally, the Benistar defendants claim that Daniel Carpenter could not have made false representations to the plaintiffs because, as the plaintiffs testified, they had not met, spoken to, or communicated in writing with him. The jury's finding of misrepresentation is supported by ample evidence in the record that Daniel Carpenter was responsible for promotional material and was intimately involved in Benistar's communications with clients, including the agreements themselves, which represented that funds would be placed in three- and six-percent money market accounts and repaid upon request. His direct personal contact with the plaintiffs was not a requirement for a

---

19. The Benistar defendants make additional arguments on the issue of fiduciary duty which we do not take up because they are in the form of conclusory statements, and not appellate argument. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). For example, we will not consider the unexplained and unsupported "argument" that "the very nature of § 1031 property exchanges precludes a fiduciary relationship."

finding of misrepresentation in this case, and we decline to disturb the jury verdict.[20]

The grant of summary judgment in favor of PaineWebber. The plaintiffs challenge the summary judgment on their claims against PaineWebber for aiding and abetting a breach of fiduciary duty and for aiding and abetting conversion. We apply New York law to our consideration of the issues.[21] Again, we view the evidence in a light most favorable to the nonmoving party, here the plaintiffs. PaineWebber came upon the scene in late September, 2002, when Merrill Lynch refused to permit any further options trading by Carpenter. Gary Stern of Merrill Lynch contacted Mitchell Rock, a close friend and broker at PaineWebber, and arranged to transfer three of the Benistar accounts to PaineWebber. Rock was informed that these were corporate accounts and that the funds in the accounts were Benistar corporate funds. The accounts were nondiscretionary, so that

---

20. Similarly, we do not disturb the judge's finding of liability under G.L. c. 93A, which was based on the same evidence as was presented at the jury trial.

21. The parties had previously agreed, and the judge so ruled in her February 5, 2002, "Memorandum and Order on PaineWebber's Motion to Dismiss," that New York law applied to the plaintiffs' tort claims against PaineWebber, under conflict of laws principles. See Restatement (Second) of Conflict of Laws § 145 (1971). See also *Choate, Hall & Stewart v. SCA Servs., Inc.*, 378 Mass. 535, 540-541, 392 N.E.2d 1045 (1979); *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. 643, 645-647, 632 N.E.2d 832 (1994).

Carpenter directed all trades, with Rock implementing them and also providing investment advice as Carpenter requested. Ninety days later, on December 20, 2002, and after heavy losses, PaineWebber discontinued the options trading and began closing out positions in the Benistar accounts. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach. . . ." *Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157 (N.Y.App.Div.2003). To satisfy the second element of the claim, the plaintiffs must show that the defendant had actual knowledge of the breach of duty. *Ibid.* Here, the plaintiffs attempt to persuade us that proof of "recklessness or willful blindness" was sufficient to satisfy the requirement of actual knowledge. Under New York law, however, it is well established that recklessness does not satisfy the element of actual knowledge in the context of a claim for aiding and abetting a breach of fiduciary duty. See *Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 494 & n. 28 (S.D.N.Y.2001). Proof that a defendant should have known of the prohibited conduct is insufficient; proof of actual knowledge is required. *Kolbeck v. LIT America, Inc.*, 939 F.Supp. 240, 246 (S.D.N.Y.1996), *aff'd*, 152 F.3d 918 (2d Cir.1998).

The facts, viewed in the plaintiffs' favor, at best demonstrated that PaineWebber should have been alerted to the possibility that Carpenter was using client

funds for options trading.[22] But proof itself was lacking that PaineWebber had actual knowledge that the Benistar accounts consisted of client funds, and was entirely lacking that PaineWebber knew those funds were subject to restrictions which were being violated. Without any evidence of actual knowledge, the plaintiffs' claims against PaineWebber cannot survive.[23] Accordingly, summary judgment was properly granted in PaineWebber's favor on the aiding and abetting claims.

The plaintiffs' conversion claims fare no better as they, again, rely on the unsupported assertion that PaineWebber had actual knowledge that Carpenter was engaged in prohibited trading with restricted client funds. Thus summary judgment on the plaintiffs' conversion claims was properly granted as well.

---

22. Such evidence included the use of the word "Trust" in Benistar's corporate name, information available on the Benistar Web site, and third-party names listed on wire transfers and on trade confirmations for the Benistar accounts.

23. The plaintiffs' claims against PaineWebber were additionally unsupported because "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Kaufman v. Cohen*, 307 A.D.2d at 126, 760 N.Y.S.2d 157. Here, the record established that PaineWebber's role was limited to implementing trades in accordance with Carpenter's directions and responding to Carpenter's inquiries for investment advice. Thus the plaintiffs also failed to provide any evidence of substantial assistance to survive summary judgment with respect to the participation element of the aiding and abetting claims.

Appendix C

Conclusion. The orders reported under rule 64(a) are affirmed. The amended judgment under rule 54(b), entered December 6, 2004, is affirmed. The orders pertaining to the assignment to the plaintiffs of Benistar's claims against PaineWebber are affirmed.

So ordered.

APPENDIX D — AWARD – NASD DISPUTE RESOLUTION

AWARD – NASD DISPUTE RESOLUTION

In the Matter of the Arbitration Between:

Benistar Employer Services Trust Corporation and Benistar Property Exchange Trust Company, Inc. (Claimants) v. USB PaineWebber Inc. n/k/a UBS Financial Services Inc. (Respondent)

Case Number: 03-08742

Hearing Site: New York, New York

Nature of the Dispute: Customers v. Member

REPRESENTATION OF PARTIES

Claimant Benistar Employer Services Trust Corporation ("BESTCO"): Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Claimant Benistar Property Exchange Trust Company ("BPETCO"): Anthony R. Zelle, Esq., Denver O'Malley, LLP, Boston, MA. Previously represented by Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Respondent UBS Financial Services, Inc., hereinafter collectively referred to as "Respondent": R. Rodd Cronan, Esq., Goodwin Procter, LLP, Boston, MA.

Appendix D

CASE INFORMATION

Statement of Claim filed on or about: December 10, 2003.

Claimant BESTCO signed the Uniform Submission Agreement: December 9, 2003.

Claimant BPETCO signed the Uniform Submission Agreement: December 9, 2003.

Respondent's Answer to the Statement of Claim filed on or about: February 3, 2004.

Respondent signed the Uniform Submission Agreement: February 24, 2004.

CASE SUMMARY

Claimants BESTCO and BPETCO asserted the following causes of action: indemnification; contribution; breach of contract; conversion; fraudulent misrepresentation; breach of fiduciary duty; negligence and violations of New York and Connecticut Unfair Trade Practices Statutes. The causes of action relate to stock options of various technology stocks.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Appendix D

RELIEF REQUESTED

Claimants BESTCO and BPETCO requested compensatory damages in the amount of $29,456,064.00; punitive damages in the amount of $58,912,128.00; pre- and post-award interest; forum fees in the amount of $1,800.00; attorneys' fees in the amount of $250,000.00; witness and production fees in the amount of $7,500.00; and other case-related costs in the amount of $5,000.00.

Respondent requested the dismissal of all claims against it, and entry of judgment in its favor, together with all reasonable attorneys' fees and NASD filing and forum costs arising from its defense to the Statement of Claim.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant BPETCO compensatory damages in the amount of $8,705,195.91.

2. Respondent is liable for and shall pay to Claimant BPETCO interest in the amount of $3,825,039.23.

3. Respondent is liable for and shall pay to Claimant BPETCO attorneys' fees in the amount of $125,000.00 pursuant to the Federal Arbitration Act.

4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= $	600.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, UBS Financial Services, Inc. is a party.

Member surcharge	= $	3,750.00
Pre-hearing process fee	= $	750.00
Hearing process fee	= $	5,500.00
Total Member Fees	= $	10,000.00

Appendix D

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

November 15-19, 2004, adjournment by Claimant BESTCO	= $	1,200.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ $450.00	= $	450.00
Pre-hearing conferences:		
July 14, 2004 1 session		
Four (4) Pre-hearing sessions with Panel @ $1,200.00 per session	= $	4,800.00
Pre-hearing conferences:		
May 4, 2004 1 session		
July 1, 2004 1 session		
October 1, 2004 1 session		
August 30, 2005 1 session		
Fifteen (15) Hearing sessions @ $1,200.00	= $	18,000.00

Appendix D

Hearing dates:		
September 19, 2005	2 sessions	
September 20, 2005	2 sessions	
September 21, 2005	2 sessions	
September 22, 2005	2 sessions	
September 23, 2005	1 session	
November 14, 2005	2 sessions	
November 15, 2005	2 sessions	
November 16, 2005	2 sessions	
Total Forum Fees		= $ 23,250.00

1. The Panel has assessed $7,750.00 of the forum fees to Claimant BESTCO.

2. The Panel has assessed $15,500.00 of the forum fees to Respondent.

Fee Summary

1. Claimant BESTCO is solely liable for:

Adjournment Fee	= $	1,200.00
Forum Fees	= $	7,750.00
Total Fees	= $	8,950.00
Less payments	= $	2,400.00
Balance Due NASD Dispute Resolution	= $	6,500.00

2. Claimants BESTCO and BPETCO are jointly and severally liable for:

Initial Filing Fee	= $	600.00
Total Fees	= $	600.00
Less payments	= $	600.00
Balance Due NASD Dispute Resolution	= $	0.00

3. Respondent is solely liable for:

Member Fees	= $	10,000.00
Forum Fees	= $	15,000.00
Total Fees	= $	25,500.00
Less payments	= $	10,000.00
Balance Due NASD Dispute Resolution	= $	15,000.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Alexander Forti — Public Arbitrator, Presiding Chairperson

Paul T. Green — Public Arbitrator

Farrell C. Glasser — Non-Public Arbitrator

Appendix D

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

s/ Alexander Forti	12/14/05
Alexander Forti Public Arbitrator, Presiding Chairperson	Signature Date
Paul T. Green Public Arbitrator	Signature Date
Farrell C. Glasser Non-Public Arbitrator	Signature Date

December 15, 2005
Date of Service (For NASD Dispute Resolution use only)

APPENDIX E — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, COMMERCIAL DIVISION DATED AND FILED APRIL 18, 2007

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:
COMMERCIAL DIVISION

Index No. 600156/06

In the matter of the application of

UBS PAINEWEBBER, INC. n/k/a
UBS FINANCIAL SERVICES, INC.,

Petitioner,

pursuant to Article 75 of the CPLR to vacate the arbitration award dated Dec. 15, 2005 and issued by the National Association of Securities Dealers in favor of:

BENISTAR PROPERTY EXCHANGE
TRUST COMPANY, INC.,

Respondent.

JUDGMENT

The Honorable Charles Edward Ramos having confirmed the arbitration award in favor of Respondent Benistar Property Exchange Trust Company, Inc. ("Benistar" or "Respondent") against Petitioner UBS Painewebber, Inc. n/k/a UBS Financial Services, Inc.

("UBS" or "Petitioner") pursuant to his November 16, 2006 Memorandum Decision and Order and in accordance with the terms of the So Ordered Stipulation and Order dated February 26, 2007 which amends the November 16, 2006 Order to direct entry of judgment in the sum of $12,655,235.14 with interest.

Now on motion of Robinson & Cole LLP, attorneys for Respondent Benistar, it is ADJUDGED that:

Respondent Benistar Property Exchange Trust Company, Inc., 2187 Atlantic Street, Stamford, CT 06902, does recover from the Petitioner UBS Painewebber, Inc. n/k/a UBS Financial Services, Inc., 800 Harbor Boulevard, Weehawken, NJ 07806, the amount of $12,655,235.14, together with interest from December 15, 2005, as calculated by the Clerk, which amounts to $1,525,909.31 totaling $14,181,144.45.

Judgment signed this 18th day of April, 2007.

s/ [illegible]
CLERK

APPENDIX F — JOINT STIPULATION REGARDING PERSONAL JURISDICTION DATED MARCH 4, 2003

COMMONWEALTH OF MASSACHUSETTS
BUSINESS LITIGATION SESSION

SUFFOLK, SS. SUPERIOR COURT

CONSOLIDATED CIVIL ACTION NOS.
01-0116-BLS; 01-0299-BLS; 01-0330-BLS;
01-0581-BLS; 02-1889-BLS; 01-00075-Norfolk

BLS 2
Courtroom 20

GAIL A. CAHALY, et al.,

Plaintiffs,

v.

BENISTAR PROPERTY EXCHANGE TRUST CO., INC., et al.,

Defendants.

JOINT STIPULATION REGARDING PERSONAL JURISDICTION

NOW COME plaintiffs Gail A. Cahaly, Jeffrey M. Johnston, Bellemore Associates, LLC, Massachusetts Lumber Company, Inc., Joseph Iantosca, individually and as trustee of Faxon Heights Apartments Realty Trust and Fern Realty Trust, and Belridge Corporation

(collectively, the "Plaintiffs"); and defendants Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation, and Carpenter Financial Group, LLC; and hereby jointly stipulate that, at all times material hereto:

1. Plaintiffs have no personal knowledge of, and do not intend to introduce any evidence relative to, the issue of where Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation and Carpenter Financial Group, LLC are domiciled.

2. Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation and Carpenter Financial Group, LLC are not organized under the laws of, nor do they maintain a principal place of business in, Massachusetts.

3. None of the Plaintiffs transacted any business with Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation or Carpenter Financial Group, LLC.

4. Plaintiffs have no personal knowledge of, and do not intend to introduce any evidence relative to, the issue of Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation or Carpenter Financial Group, LLC's contacts with and/or acts or omissions in Massachusetts, except that Plaintiffs plan to offer evidence showing these defendants' alleged relationship with Benistar Property Exchange Trust Co., which Plaintiffs contend did engage in acts or omissions in Massachusetts.

5. Plaintiffs have no personal knowledge of, and do not intend to introduce any evidence relative to, the issue of whether Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation or Carpenter Financial Group, LLC regularly do or solicit business, contract to supply services or things, engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered, in Massachusetts.

ACCEPTED AND AGREED this 4th day of March, 2003.

Gail A. Cahaly, Jeffrey M. Johnston
and Bellemore Associates, LLC

Massachusetts Lumber Co., Inc.,
Joseph Iantosca, individually and as
trustee of Faxon Heights Apartments
Realty Trust and Fern Realty Trust, and
Belridge Corporation

By their attorneys,

s/ William C. Nystrom
William C. Nystrom, BBO No. 559656
Laura J. Nelson, BBO No. 638313
SCHWARTZ AND NYSTROM, LLC
419 Boylston Street
Boston, MA 02116
(617) 421-1800

Appendix F

s/ Anthony R. Zelle
Anthony R. Zelle, BBO No. 548141
John E. O'Brien, Jr., BBO No. 640982
ROBINSON & COLE. LLP
One Boston Place
Boston, MA 02108
(617) 557-9500

Benistar Admin Services, Inc., Benistar Employer Services Trust Corporation, and Carpenter Financial Group, LLC

By their attorney,

s/ Jack E. Robinson
Jack E. Robinson, BBO No. 559683
2187 Atlantic Street
Stamford, CT 06902
(203) 425-4500